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Structure, Legitimacy, and NAFTA's Investment Chapter

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ARTICLES

Structure, Legitimacy, and NAFTA's Investment Chapter

*Charles H. Brower, II**

ABSTRACT

In this Article, Professor Brower examines the investment chapter of the North American Free Trade Agreement (NAFTA). He argues that the relevant treaty provisions lack a substantial measure of textual clarity. In addition, he argues that ad hoc tribunals based on the commercial arbitration model have generated incoherent doctrine and are relatively less accountable, transparent, and accessible than permanent tribunals. Furthermore, he argues that the NAFTA Parties and their courts so far appear to place a higher priority on the pursuit of narrow self-interest than on the principled administration of international governance. Collectively, these circumstances help to explain the frequency and intensity with which claimants, tribunals, and the NAFTA Parties refer to the perceived illegitimacy of investor-state arbitration under NAFTA. While superior proposals may emerge, Professor Brower suggests that mitigation of this legitimacy crisis may require the continuation of ad hoc arbitration, followed by review by a standing appellate body and supervised by an accountable, transparent Free Trade Commission.

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I. INTRODUCTION

Debates about the investment chapter—Chapter 11—of the North American Free Trade Agreement (NAFTA)[1] have become common fare.[2] From these discussions, however, a surprising

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1. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., ch. 11, 32 I.L.M. 605, 639-49 [hereinafter NAFTA].

2. *See, e.g.*, Charles H. Brower, II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 44 (2001) [hereinafter Brower, *Empire Strikes Back*]; J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 434-35 (2002); Charles H. Brower, II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, 465 (2002) [hereinafter Brower, *Beware the Jabberwock*]. *See also* Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter*, 34 N.Y.U. J. INT'L L. & POL. 1, 3 (2001) (indicating that "Chapter 11 has generated enormous controversy"); Stephen Clarkson, *Systemic or Surgical?: Possible Cures for NAFTA's Investor-State Dispute Process*, 36 CAN. BUS. L.J. 368, 369 (2002) (mentioning Chapter 11's "high potential for continuing controversy"); Julie Soloway & Jeremy Broadhurst, *What's in the Medicine Chest for Chapter 11's Ills?*, 36 CAN. BUS. L.J. 388, 388 (2002) (mentioning the existence of "widespread allegations from both inside and outside the trade law community that [NAFTA's investment chapter] is sick and in desperate need of very powerful medication"); Gus van Harten, *Guatemala's Peace Accords in a Free Trade Area of the Americas*, 3 YALE HUM. RTS. & DEV. L.J. 113, 142 (2000) (observing that NAFTA's investment chapter has been "the subject of a great debate"); Joel

phenomenon has emerged—namely, the intensity and sincerity with which claimants, the NAFTA Parties, and tribunals accuse one another of illegitimate conduct in the course of arbitrating investment disputes. Left unresolved, such widespread and enduring perceptions bode ill for the future of investor-state arbitration under NAFTA and the extension of a similar investment regime to the entire Western hemisphere through an Agreement on the Free Trade Area of the Americas (FTAA).[3] To redress the troubling state of affairs, this Article initiates a discourse about the sources of perceived illegitimacy in Chapter 11 disputes, as well as the means for their

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C. Beauvais, *Regulatory Expropriations Under NAFTA: Emerging Principles and Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 246 (2002) (mentioning the "storm of controversy" created by Chapter 11); Marc Lalonde, *When Investor Rights Go Too Far*, TORONTO STAR, May 1, 2002, at B1, *available at* 2002 WL 17993459 (recognizing that "[n]o part of the North American Free Trade Agreement . . . has generated more controversy than the foreign investor rights provisions in Chapter 11 of the agreement").

3. *See* Draft Agreement on the Free Trade Area for the Americas, Chapter on Investment, FTAA.TNC/w/133/Rev.1, July 3, 2001, *available at* http://www.ftaa-alca.org. *See also* van Harten, *supra* note 2, at 140 (reporting that "[t]he U.S. Government . . . has forcefully advanced the NAFTA investment provisions as a prototype for the FTAA"); Beauvais, *supra* note 2, at 255 (predicting that some form of NAFTA's investment Chapter "will be incorporated into the Free Trade Agreement for the Americas"); Howard Mann & Konrad von Moltke, Protecting Investor Rights and the Public Good: Assessing NAFTA's Investment Chapter 2 (Mar. 2002) (unpublished manuscript, prepared for Investment Law and Sustainable Development Tri-National Policy Workshops), *at* http://www.iisd.org/trade/ilsdworkshop/pdf/background_en.pdf [hereinafter Mann & von Moltke, *manuscript*] (observing that "Chapter 11 has provided the template for the initial stages of investment negotiations in the Free Trade Area of the Americas process"). *Cf.* David A. Gantz, *Resolution of Investment Disputes Under the North American Free Trade Agreement*, 10 ARIZ. J. INT'L & COMP. L. 335, 335, 348 (1993) (recognizing that Chapter 11 might serve as a model for similar arrangements); Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 CAN. BUS. L.J. 405, 408 (2002) (predicting that "North America will likely be seen as the petri dish" for the emergence of a uniform body of international economic law).

Concerns about the operation of Chapter 11 prompted the Organization for Economic Cooperation and Development to abandon negotiations on a Multilateral Agreement on Investment (MAI) in 1998. *See* HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT 7, 11, 15 (1999) [hereinafter MANN & VON MOLTKE, NAFTA'S CHAPTER 11]; Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration*, 3 J. WORLD INV. 173, 180 (2002); Robert K. Paterson, *A New Pandora's Box?: Private Remedies for Foreign Investors Under the North American Free Trade Agreement*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 77, 105-06 (2000); Pierre Sauve, *Canada, Free Trade, and the Diminishing Returns of Hemispheric Regionalism*, 4 UCLA J. INT'L L. & FOREIGN AFF. 237, 244 (1999-2000); Julie A. Soloway, *NAFTA's Chapter 11: The Challenge of Private Party Participation*, 16 J. INT'L ARB. 1, 2-3 (1999) [hereinafter Soloway, *Challenge of Private Party Participation*]; Julie A. Soloway, *Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy*, 8 MINN. J. GLOBAL TRADE 55, 88 (1999) [hereinafter Soloway, *Environmental Trade Barriers Under NAFTA*]; Beauvais, *supra* note 2, at 255. Some observers believe that perceived abuses of the Chapter 11 process "put at even greater risk the eventual adoption of a hemispheric trade pact." Lalonde, *supra* note 2.

mitigation in future investment regimes. Laying the foundation for this analysis, Part II reviews the purpose, structure, and early operation of NAFTA's investment chapter. Part III examines the nature of legitimacy and identifies the factors that support perceptions of legitimacy in international legal regimes. Building on Parts II and III, Part IV explains why NAFTA's investment chapter generates widespread accusations of illegitimate conduct by claimants, states parties, and arbitral tribunals. Finally, with an eye towards improving the performance of multilateral investment regimes, Part V assesses proposals for reform against the necessary criteria for generating perceptions of legitimacy, as well as advancing the more specific goals of investment regimes.

II. PURPOSE, STRUCTURE, AND EARLY OPERATION OF CHAPTER 11

When ratifying NAFTA, Canada, Mexico and the United States undertook to "[ensure] a predictable commercial framework for business planning and investment,"[4] "increase substantially investment opportunities in the[ir] territories,"[5] and "create effective procedures for . . . the resolution of disputes"[6]—all in a manner consistent with "environmental protection and conservation,"[7] preservation of their "flexibility to safeguard the public welfare,"[8] and promotion of "sustainable development."[9] Chapter 11 implements these objectives by establishing standards for treatment of investors and adopting procedures for resolving investor-state disputes.[10]

For example, Section A of Chapter 11 defines the scope and content of investment disciplines accepted by the NAFTA Parties. With respect to scope, the disciplines of Section A apply to "measures adopted or maintained by a [NAFTA] Party relating to" the investors of another NAFTA Party, as well as the investments of investors of another NAFTA Party located in the territory of the host state.[11] Substantively, Section A permits direct expropriation, indirect expropriation, and measures "tantamount to . . . expropriation" of investments only for a public purpose, on a nondiscriminatory basis, in accordance with due process of law and the minimum standard of treatment under Chapter 11, and upon prompt payment of fair

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4. NAFTA, *supra* note 1, pmbl.
5. *Id.* art. 102(1)(c).
6. *Id.* art. 102(1)(e).
7. *Id.* pmbl.
8. *Id.*
9. *Id.*
10. *See* Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 28 PEPP. L. REV. 43, 46 (2001).
11. NAFTA, *supra* note 1, art. 1101(1).

market value—plus interest—in freely-transferable funds.[12] In addition, Section A prohibits certain performance requirements, including requirements to export a given level or percentage of goods or services, or to achieve a given level or percentage of domestic content.[13] Furthermore, Section A requires the NAFTA Parties to treat each others' investors in accordance with the relative standards of national treatment and most-favored-nation (MFN) treatment.[14] Finally, Section A establishes a minimum standard of treatment, which mandates treatment in accordance with international law, including fair and equitable treatment.[15]

Unlike the World Trade Organization's (WTO) disciplines on trade in goods, Chapter 11 does not, except with respect to performance requirements,[16] incorporate general exceptions for measures necessary to protect public morals; necessary to protect human, animal or plant life, or health; or relating to the conservation of natural resources.[17] Nevertheless, two provisions of Chapter 11 recognize that the NAFTA Parties may undertake public health "functions" and may adopt, maintain, or enforce measures they consider "appropriate" to ensure that investments proceed "in a manner sensitive to environmental concerns"—all provided that the functions and measures remain consistent with their obligations under NAFTA's investment chapter.[18] Although these provisions evidently have some effect on the NAFTA Parties' rights and obligations,[19] their ambiguous text leaves their relationship to investment disciplines largely unresolved.[20]

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12. *See id.* art. 1110(1)-(6).
13. *See id.* art. 1106(1)(a)-(b), (3)(b).
14. *See id.* arts. 1102, 1103.
15. *See id.* art. 1105(1).
16. *See id.* art. 1106(6).
17. *Compare* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. 5, A3, T.I.A.S. 1700, 55 U.N.T.S. 187 (establishing such general exceptions), *with* NAFTA, *supra* note 1, art. 2101 (incorporating the GATT's general exceptions with respect to trade in goods, but not investment). *See also* INT'L INST. FOR SUSTAINABLE DEV. & WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS 12 (2001) [hereinafter PRIVATE RIGHTS, PUBLIC PROBLEMS]; Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 151-52 (2002); Todd Weiler, *A First Look at the Interim Merits Award in* S.D. Myers, Inc. v. Canada*: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 HASTINGS INT'L & COMP. L. REV. 173, 181 (2001); Beauvais, *supra* note 2, at 266; Samrat Ganguly, *The Investor-State Dispute Mechanism (IDSM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 125 (1999); MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 11.
18. *See* NAFTA, *supra* note 1, arts. 1101(4), 1114(1).
19. *See, e.g.*, Cayuga Indians Claims (U.K. v. U.S.), 73 R.I.A.A. 173, 176 (1926) ("[I]t is a principle of interpretation recognized in all systems of law that a clause must be so interpreted as to give a meaning rather than so as to deprive it of a meaning."); I SIR HERSCH LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 861 (7th ed. 1948) ("It is to be taken for granted that the parties intend the stipulations of a treaty to have a certain effect, and not to be meaningless. Therefore, an interpretation is not

In order to secure the rights and obligations just described, Section B of Chapter 11 "establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."[21] To this end, Section B memorializes the NAFTA Parties' standing consent to investor-state arbitration.[22] Their consent represents a permanent offer,[23] which investors may accept by submitting disputes to: (1) arbitration under the ICSID Convention, if the investor's home state and the disputing NAFTA Party are both states parties to that convention;[24] (2) the Additional Facility Rules of ICSID, if *either* the investor's home state or the disputing NAFTA Party is a state party to the ICSID Convention; or (3) the UNCITRAL Arbitration Rules.[25] As a condition precedent to the submission of claims, however, investors must execute their own written consents to arbitration. Investors must also waive their right to initiate or continue any other dispute resolution proceedings with respect to the allegedly offending measure, *except* for certain proceedings for extraordinary relief not involving the payment of damages.[26] Investors who initiate claims on behalf of owned or controlled enterprises located in another NAFTA Party must also submit

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admissible which would make a stipulation meaningless, or ineffective."). *But see* PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 12 (indicating that Article 1114(1) "is not particularly meaningful"); Paterson, *supra* note 3, at 105 (suggesting that Article 1114 is "largely meaningless"); Weiler, *supra* note 17, at 181-82 (describing Article 1114 as a "hortatory environmental provision" that cannot "override mandatory treaty obligations").

20. *See* Tollefson, *supra* note 17, at 151.

21. NAFTA, *supra* note 1, art. 1115.

22. *See id.* art. 1122(1).

23. *See In re* Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States, Petitioner's Outline of Argument, Feb. 5, 2001, para. 224 (B.C. Sup. Ct. 2001) (on file with author) [hereinafter Mexico's Outline of Argument (*Metalclad*)]; Cremades & Cairns, *supra* note 3, at 184; J. Christopher Thomas, *Investor-State Arbitration Under NAFTA Chapter 11*, 1999 CAN. Y.B. INT'L L. 99, 113.

24. *See* NAFTA, *supra* note 1, art. 1120(1). The "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. *See* NAFTA, *supra* note 1, art. 1139. Presently, the United States is a state party to the ICSID Convention, but Canada and Mexico are not. *See* Ethyl Corp. v. Canada, Decision Regarding the Place of Arbitration, Nov. 28, 1997, 38 I.L.M. 702, 703 n.5 (1999); Paterson, *supra* note 3, at 107; Chris Tollefson, Metalclad v. United Mexican States *Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process*, 11 MINN. J. GLOBAL TRADE 183, 198 (2002).

25. The "UNCITRAL Arbitration Rules" mean the U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules, G.A. Res. 31/98, U.N. Commission on International Trade Law, 31st Sess., Supp. No. 17, ch. V, sec. C, U.N. Doc. A/31/17 (1976). *See* NAFTA, *supra* note 1, art. 1139.

26. NAFTA, *supra* note 1, art. 1121(1).

waivers executed by those enterprises.[27] Article 1122(2) recognizes that, when taken together, the treaty-based consent of NAFTA Parties and the submission of claims by investors satisfy the requirements for written arbitration agreements under the ICSID Convention, the New York Convention,[28] and the Inter-American Convention.[29]

Once submitted to arbitration, the institutional rules selected by the investor govern the proceedings, except as modified by Section B of Chapter 11.[30] Section B modifies the arbitration rules, *inter alia*, by creating a limited right of audience for non-disputing NAFTA Parties and identifying the proper law for Chapter 11 disputes. Thus, Articles 1127 and 1129 entitle non-disputing NAFTA Parties to receive copies of all pleadings, evidence, and written arguments.[31] Article 1128 also grants non-disputing NAFTA Parties the right to make submissions to Chapter 11 tribunals regarding the interpretation of NAFTA.[32] Article 1131(1) requires tribunals to render decisions in accordance with NAFTA and other "applicable rules of international law."[33] Tribunals must also apply interpretations of NAFTA made by the Free Trade Commission—the three NAFTA Parties acting in concert through cabinet-level representatives.[34]

With respect to the binding effect, judicial supervision, and enforcement of Chapter 11 awards, Article 1136 establishes three relevant principles. First, awards "have no binding force *except* between the disputing parties and in respect of the particular case."[35] Second, prevailing parties may not seek enforcement of awards rendered under the Additional Facility or UNCITRAL Rules until either (1) three months have passed without the losing party having

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27. *Id.* art. 1121(2). In addition, investors cannot submit a claim to arbitration until six months have elapsed since the events giving rise to the claim. *Id.* art. 1120(1). Before actually submitting a claim, investors must also wait for 90 days after giving the disputing NAFTA Party notice of intent to submit the claim to arbitration. *Id.* art. 1119. Finally, investors may not submit a claim to arbitration if more than three years have elapsed from the date on which the investor acquired (or should have acquired) knowledge both of the alleged breach and the occurrence of loss or damage. *See id.* arts. 1116(2), 1117(2).

28. The "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. *See* NAFTA, *supra* note 1, art. 1139.

29. The "Inter-American Convention" means the Inter-American Convention on Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448 (1990), O.A.S. Treaty Series no. 42, *reprinted in* 14 I.L.M. 336 (1975) [hereinafter Inter-American Convention]. *See* NAFTA, *supra* note 1, art. 1139.

30. *See* NAFTA, *supra* note 1, art. 1120(2).

31. *See id.* arts. 1127, 1129.

32. *See id.* art. 1128.

33. *Id.* art. 1131(1).

34. *See id.* art. 1131(2).

35. *Id.* art. 1136(1) (emphasis added).

initiated a proceeding to revise, set aside, or annul the award, or (2) a court has dismissed or allowed such a proceeding and there is no further appeal.[36] This provision evidently gives the losing parties an opportunity to seek revision or annulment of Chapter 11 awards by municipal courts at the seat of arbitration.[37] Third, investors may, as appropriate, seek enforcement of awards under the ICSID Convention, the New York Convention, or the Inter-American Convention.[38] For the purposes of the New York Convention and the Inter-American Convention, Chapter 11 proceedings "shall be considered to arise out of a commercial relationship."[39]

Regular observers of international investment law will note that Chapter 11 bears a family resemblance to bilateral investment treaties (BITs).[40] Yet, while Chapter 11 largely adopts the familiar structure of BITs, it projects that framework onto a novel setting:[41] one in which the substantive and procedural obligations govern the relations between two developed states—Canada and the United States—with mature regulatory systems and a significant, reciprocal volume of cross-border investment.[42] As a result, NAFTA investors

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36. *See id.* art. 1136(3).

37. *See* Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT'L 393, 418 (2000); Thomas, *supra* note 23, at 109 & n.34.

38. *See* NAFTA, *supra* note 1, art. 1136(6).

39. *Id.* art. 1136(7).

40. *See* S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000), paras. 58-77 (separate opinion of Bryan Schwartz) *available at* http://www.appletonlaw.com/4b2myers.htm [hereinafter *S.D. Myers*, Partial Award]; Michael P. Avramovich, *The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?*, 31 J. MARSHALL L. REV. 1201, 1240-41 (1998); Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 193-94 (2001); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 653, 671 (2001); Gantz, *supra* note 3, at 339; Lawrence L. Herman, *Settlement of International Trade Disputes—Challenges to Sovereignty—A Canadian Perspective*, 24 CAN.-U.S. L.J. 121, 133 (1998); Paterson, *supra* note 3, at 85; Soloway, *Challenge of Private Party Participation*, *supra* note 3, at 4; van Harten, *supra* note 2, at 137; David R. Adair, Comment, *Investors' Rights: The Evolutionary Process of Investment Treaties*, 6 TULSA J. COMP. & INT'L L. 195, 204 (1999); Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 181, 195 (1996); Julia Ferguson, *California's MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA*, 11 COLO. J. INT'L ENVTL L. & POL'Y 499, 502 (2000); Ganguly, *supra* note 17, at 132-33; Tali Levy, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard*, 31 STAN. J. INT'L L. 423, 445, 446-47 (1995).

41. *See* Brower, *supra* note 10, at 47; Brower & Steven, *supra* note 40, at 194-95.

42. *See* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 4; Brower & Steven, *supra* note 40, at 195; Gantz, *supra* note 40, at 672; Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State*

can now require the governments of Canada and the United States to satisfy the heavy obligations normally thrust upon developing states in BITs.[43]

Although virtually no one foresaw Chapter 11's capacity to interfere with the legislative, executive, and judicial systems of the NAFTA Parties, particularly Canada and the United States,[44] investors have now submitted almost 20 claims,[45] which seek billions of dollars in damages; challenge measures that ostensibly protect public health, safety, and the environment; and attack the legitimacy of important governmental services, including the state judicial systems of Massachusetts and Mississippi.[46] This unexpected proliferation of claims has disturbed many observers who continue to denounce the purportedly "aggressive"[47] use of investor-state

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Dispute Settlement, 27 INT'L LAW. 727, 731 (1993) [hereinafter Price, *Overview of the NAFTA Investment Chapter*]; Daniel M. Price, *Towards an Effective International Investment Regime, Remarks*, 91 AM. SOC'Y INT'L L. PROC. 485, 492 (1997); Tollefson, *supra* note 17, at 143; Sabrina Safrin et al., *International Legal Developments in Review: 1999: Public International Law/Environmental Law*, 34 INT'L LAW. 707, 723 (2000).

43. Brower, *supra* note 10, at 47; Price, *Overview of the NAFTA Investment Chapter*, *supra* note 42, at 736.

44. *See* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 4; Clarkson, *supra* note 2, at 378; Herman, *supra* note 40, at 133-34; Soloway, *Challenge of Private Party Participation*, *supra* note 3, at 4; Soloway, *Environmental Trade Barriers Under NAFTA*, *supra* note 3, at 88; Tollefson, *supra* note 17, at 146; Ferguson, *supra* note 40, at 503. *But see* Richard G. Dearden, *Arbitration of Expropriation Disputes Between an Investor and the State Under the North American Free Trade Agreement*, 29 J. WORLD TRADE 113, 114, 126-27 (1995) (predicting the regular use of Chapter 11 in disputes alleging expropriation and explaining that Chapter 11 fetters the discretion of NAFTA Parties); Paterson, *supra* note 3, at 85-86 ("Given the large scale of inter-NAFTA-Party investment, it was predictable that Chapter 11 would attract several claims. . . .").

45. *See, e.g.*, Tollefson, *supra* note 17, at 187-88.

46. Brower, *Empire Strikes Back*, *supra* note 2, at 45. *See also* Brower, *supra* note 10, at 50-51. In two cases, Canadian investors have claimed that state court proceedings in Massachusetts and Mississippi either caused or contributed to violations of Articles 1102 (national treatment), 1105 (minimum standard of treatment), and 1110 (measures tantamount to expropriation). *See* Mondev Int'l Ltd. v. United States, Notice of Arbitration (Sept. 1, 1999), paras. 127-33, 138-39, 141-48, 150, *available at* http://www.naftaclaims.com; Loewen Group, Inc. v. United States, Notice of Claim (Oct. 30, 1998), at 2-3, *available at* http://www.naftaclaims.com [hereinafter *Loewen Group*, Notice of Claim]. In another case, United Parcel Service of America, Inc. claims that the operations of Canada Post (Canada's national mail service) violate Articles 1102 (national treatment) and 1105 (minimum standard of treatment), and result in the unlawful use of the letter-mail monopoly to cross-subsidize non-monopolized services. *See* United Parcel Serv. of Am., Inc. v. Canada, Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement (Jan. 19, 2000), paras. 5-16, 19, 25-31, *available at* http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp.

47. MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 4; Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 TUL. ENVT'L L.J. 387, 405-06 (2000); David Runnalls & Howard Mann, *Still Time to Fix Flawed Trade Rule*, WINNIPEG FREE PRESS, Apr. 30, 2001, at A11, *available at* 2001 WL 16236366. *See*

arbitration as an "offensive" weapon[48] that has "chilled"[49] the exercise of regulatory authority and caused an "alarming" loss of sovereignty.[50]

Despite such expressions of concern, the NAFTA Parties enjoyed considerable success in responding to the initial wave of Chapter 11 claims. Thus, in two cases, tribunals rendered final or partial-final awards against the investors.[51] In a third case, the tribunal

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also J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 466 (1999); Daniel R. Loritz, Comment, *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed Under NAFTA's Chapter 11*, 22 LOY. L.A. INT'L & COMP. L. REV. 533, 534 (2000).

48. *See* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 5; Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of* Metalclad Corporation v. United Mexican States, 10 MINN. J. GLOBAL TRADE 209, 276 (2001); Mann, *supra* note 47, at 405; Francisco Nogales, *The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and the Environment*, 8 ANN. SURV. INT'L & COMP. L. 97, 110 (2001); Tollefson, *supra* note 24, at 184; Ferguson, *supra* note 40, at 503; Ganguly, *supra* note 17, at 153; Runnalls & Mann, *supra* note 47, at A11; Bruce Stokes, *Talk About Unintended Consequences!*, 33 NAT'L J. 1592, 1592 (2001), *available at* 2001 WL 7182202. *See also* PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 16, 19 (discussing Chapter 11's transformation from "shield" to "sword"); Beauvais, *supra* note 2, at 264 (claiming that NAFTA empowers "savvy investors" to use Chapter 11 "as a sword against regulation, rather than a shield against discriminatory expropriations").

49. *See S.D. Myers*, Partial Award, *supra* note 40, para. 203; PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 34; Clarkson, *supra* note 2, at 379; Mann, *supra* note 47, at 406; Tollefson, *supra* note 17, at 148; Tollefson, *supra* note 24, at 184-85; van Harten, *supra* note 2, at 142; Beauvais, *supra* note 2, at 246-47; Justin Byrne, Note, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, 35 TEX. INT'L L.J. 415, 432 (2000); Ferguson, *supra* note 40, at 500; Ganguly, *supra* note 17, at 119; Loritz, *supra* note 47, at 546; Lalonde, *supra* note 2. *See also* Rainer Geiger, *Towards a Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 467, 471 (1998) (observing that "[e]nvironmental organizations are concerned about a chilling effect on governmental protection of the environment, resulting from investor claims that environmental regulation amounts to expropriation").

50. Ganguly, *supra* note 17, at 126. *See also S.D. Myers*, Partial Award, *supra* note 40, paras. 12, 86; Kevin Banks, *NAFTA's Article 1110—Can Regulation Be Expropriation?*, 5 NAFTA L. & BUS. REV. AM. 499, 499 (1999); David A. Gantz, *Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA*, 31 ENVT'L L. REP. 10646, 10646-47 (2001), *available at* WESTLAW, 31 ELR 10646; Herman, *supra* note 40, at 123, 134; Sauve, *supra* note 3, at 244; Julie A. Soloway, *Environmental Trade Barriers Under NAFTA*, *supra* note 3, at 88; Byrne, *supra* note 49, at 430; Loritz, *supra* note 47, at 546-47.

51. *See* Azinian v. Mexico, Award (Nov. 1, 1999), paras. 93-124, *available at* http://www.worldbank.org/icsid/cases/awards.htm [hereinafter *Azinian*, Award] (denying a claim that Mexico violated Article 1110 (expropriation) and also finding *proprio motu* that Mexico complied with its obligations under Article 1105 (minimum standard of treatment)); Pope & Talbot v. Canada, Interim Award (June 26, 2000), paras. 64-80, 96-105, *available at* http://www.appletonlaw.com/4b3P&T.htm [hereinafter *Pope & Talbot*, Interim Award] (denying claims that Canadian export regulations violated Articles 1106 (performance requirements) and 1110 (expropriation)).

In a subsequent award, the *Pope & Talbot* tribunal also denied numerous claims that Canadian export regulations violated Articles 1102 (national treatment) and 1105

dismissed the claim on jurisdictional grounds.[52] Four more cases ended either in the abandonment, withdrawal, or settlement of claims for relatively modest amounts.[53] More recently, however, Chapter 11 tribunals sitting in Canada issued final or partial-final awards against Mexico and Canada in *Metalclad Corp. v. Mexico*,[54] *S.D. Myers, Inc. v. Canada*,[55] and *Pope & Talbot, Inc. v. Canada*.[56]

Stung by this series of defeats, the NAFTA Parties have apparently launched a two-pronged campaign to assert control over the Chapter 11 process, to purge their responsibility for liabilities already imposed, and to immunize themselves against the prospect of liability in pending matters.[57] First, Mexico sought, and partly obtained, judicial review of the merits of the *Metalclad* award from the Supreme Court of British Columbia.[58] Canada has petitioned its

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(minimum standard of treatment). *See* Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2001), paras. 83-104, 119-55, 182-85, *available at* http://www.appletonlaw.com/4b3P&T.htm [hereinafter *Pope & Talbot,* Award on the Merits of Phase 2]. Although the tribunal later found that the Canadian government violated Article 1105 by conducting a vindictive audit procedure during the arbitration proceedings, the tribunal awarded only $461,666 in damages and the Canadian government "welcomed" the award as a "decisive[ ]" and "overall" victory. *See id.* at paras. 156-81; Dep't of Foreign Aff. and Int'l Trade, *News Release: Canada Wins NAFTA Chapter 11 Dispute* (Apr. 10, 2001), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104070.htm. *See also* Pope & Talbot v. Canada, Award in Respect of Damages (May 31, 2002), paras. 87-91, *at* http://www.dfait-maeci.gc.ca/tna-nac/damage_award.pdf [hereinafter *Pope & Talbot,* Award in Respect of Damages].

52. *See* Waste Management, Inc. v. Mexico, Award (June 2, 2000), *available at* http://www.worldbank.org/icsid/cases/awards.htm [hereinafter *Waste Mgmt.*, Award].

53. *See* Brower, *supra* note 10, at 48 (discussing the settlement of Ethyl Corp.'s $251 million claim against Canada for $13 million); Tollefson, *supra* note 17, at 187-88 (indicating that, as of 2002, three investors abandoned or withdrew their claims).

54. *See* Metalclad Corp. v. Mexico, Award (Aug. 30, 2000), *available at* http://www.worldbank.org/icsid/cases/awards.htm [hereinafter *Metalclad*, Award].

55. *See S.D. Myers*, Partial Award, *supra* note 40.

56. *See Pope & Talbot*, Award on the Merits of Phase 2, *supra* note 51; *Pope & Talbot*, Award in Respect of Damages, *supra* note 51. As noted above, the *Pope & Talbot* tribunal ruled in Canada's favor on virtually all points, but found one minor violation of Article 1105 (minimum standard of treatment) relating to Canada's behavior during the pendency of the arbitration. *See supra* note 51.

57. Brower, *Beware the Jabberwock*, *supra* note 2, at 485.

58. *See* United Mexican States v. Metalclad Corp., Reasons for Judgment of Hon. Mr. Justice Tysoe, paras. 61-75 (B.C. Sup. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-2may.pdf [hereinafter *Metalclad*, Reasons for Judgment of Hon. Mr. Justice Tysoe]; Mexico's Outline of Argument (*Metalclad*), *supra* note 23, paras. 131, 145-66; *In re* Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States, Outline of Argument of Intervenor Attorney General of Canada (Feb. 16, 2001), paras. 25-27, 30 (B.C. Sup. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/canada_submission-e.pdf [hereinafter Canada's Outline of Argument (*Metalclad*)]; Brower, *Beware the Jabberwock*, *supra* note 2, at 479-84; Brower, *Empire Strikes Back*, *supra* note 2, at 61-68.

Federal Court for similar relief from the *S.D. Myers* award.[59] Second, in July 2001, the trade ministers of Canada, Mexico, and the United States adopted certain Notes of Interpretation (Notes) regarding the obligation under Article 1105(1) to treat NAFTA investors "in accordance with international law, including fair and equitable treatment."[60] Specifically, Section B of the Notes provides that:

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[61]

Although the Notes might not bear that construction, the NAFTA Parties have interpreted them to reduce Article 1105(1) to the customary international law prohibition of egregious, outrageous, or shocking governmental conduct.[62] In addition, the NAFTA Parties

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59. *See In re* Arbitration Under Chapter 11 of NAFTA Between S.D. Myers, Inc. and Gov't of Canada, Notice of Application (Feb. 8, 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/sdmyers_review-e.asp; *In re* Arbitration Under Chapter 11 of NAFTA Between S.D. Myers, Inc. & Gov't of Canada, Applicant's Memorandum of Fact and Law, paras. 135, 137, 196, 222, 224 (Can. Fed. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/sdmyers_review-e.asp [hereinafter *S.D. Myers*, Canada's Memorandum of Fact and Law]; *In re* Arbitration Under Chapter 11 of NAFTA Between S.D. Myers, Inc. and Gov't of Canada, Intervenor's Memorandum of Fact and Law (Dec. 13, 2001), paras. 4, 19, 26-29, 47-55, 60-61, 101-06, 133-42, (Can. Fed. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/sdmyers_review-e.asp [hereinafter *S.D. Myers*, Mexico's Memorandum of Fact and Law].

60. Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, § B, *at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp.

61. *Id.*

62. *See* Charles H. Brower, II, *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOC'Y INT'L L. PROC. 9, 10 (2002). *See also Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 52-65; ADF Group, Inc. v. United States, Post-Hearing Submission of Respondent United States on Article 1105(1) and *Pope & Talbot* (June 27, 2002), at 2-4, *at* http://www.state.gov/documents/organization/11662.pdf [hereinafter U.S. Post-Hearing Submission (*ADF*)]; ADF Group, Inc. v. United States, Rejoinder of Respondent United States (Mar. 29, 2002), at 34, *at* http://www.state.gov/ documents/organization/9359.pdf; Loewen Group, Inc. v. United States, Response of United States to the November 9, 2001 Submissions of the Governments of Canada and Mexico Pursuant to NAFTA Article 1128 (Dec. 7, 2001), at 9, *at* http://www.state.gov/documents/organization/6926.pdf [hereinafter *Loewen Group*, U.S. Response to Article 1128 Submissions]; Loewen Group, Inc. v. United States, Second Article 1128 Submission of United Mexican States (Nov. 9, 2001), at 5, *at*

assert and, as of this writing in July 2002, one tribunal has agreed that the Notes govern the outcome of claims that antedate July 2001, even in cases where tribunals have already rendered partial-final awards on liability.[63]

Emerging from the ebb and flow of claims, awards, annulment proceedings, and notes of interpretation, one increasingly finds allegations regarding the legitimacy of various steps taken by those involved in the Chapter 11 process.[64] Joined by civil society and a number of scholars, the NAFTA Parties accuse claimants of advancing illegitimate claims[65] and describe the illegitimate nature of tribunals and their decisions.[66] Joined by other scholars and,

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http://www.state.gov/documents/organization/6362.pdf [hereinafter *Loewen Group*, Mexico's Second Article 1128 Submission].

63. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 49, 51; U.S. Post-Hearing Submission (*ADF*), *supra* note 62, at 9-10, 9-10 n.22; United Parcel Serv. of Am., Inc. v. Canada, Second Submission of the United States (May 13, 2002), para. 11, *at* http://www.state.gov/documents/organization/10235.pdf; Methanex Corp. v. United States, Article 1128 Submission of United Mexican States (Feb. 11, 2002), at 2-3, 7, *at* http://www.state.gov/documents/organization/8070.pdf; Methanex Corp. v. United States, Third Submission of Canada Pursuant to NAFTA Article 1128 (Feb. 8, 2002), paras. 5, 8, *at* http://www.state.gov/documents/organization/8060.pdf [hereinafter *Methanex*, Canada's Third Article 1128 Submission]; *Loewen Group*, U.S. Response to Article 1128 Submissions, *supra* note 62, at 2; Loewen Group, Inc. v. United States, Submission of the Government of Canada Pursuant to NAFTA Article 1128 (Nov. 19, 2001), paras. 15, 21, *at* http://www.state.gov/documents/organization/6327.doc; *Loewen Group*, Mexico's Second Article 1128 Submission, *supra* note 62, at 1; ADF Group, Inc. v. United States, Counter-Memorial of Respondent United States on Competence and Liability (Nov. 29, 2001), at 48-49, 50, *at* http://www.state.gov/documents/organization/7919.pdf; Methanex Corp. v. United States, Response of Respondent United States to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation (Oct. 26, 2001), at 2-3, *at* http://www.state.gov/documents/organization/6028.pdf; Loewen Group, Inc. v. United States, Rejoinder of the United States (Aug. 27, 2001), at 111-12, 144, 146-47, *at* http://www.state.gov/documents/organization/7388.pdf. *See also* Thomas, *supra* note 2, at 455.

64. *See, e.g.*, Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP. L. REV. 303, 308 (2000) (mentioning the "potential . . . legitimacy problem" of Chapter 11); Afilalo, *supra* note 2, at 52 (asserting that Chapter 11 "suffers from a crisis of legitimacy"); Clarkson, *supra* note 2, at 369 (referring to the "low legitimacy" of Chapter 11).

65. *See* Loewen Group, Inc. v. United States, Counter-Memorial of the United States (Mar. 30, 2001), at 3, *at* http://www.state.gov/documents/organization/7387.pdf (accusing the claimant of transforming Chapter 11 into a "no-fault insurance policy"); Methanex Corp. v. United States, Statement of Defense of Respondent United States of America (Aug. 10, 2000), para. 2, *available at* http://www.methanex.com/investorcentre/mtbe ("Methanex's claims do not remotely resemble the type of grievance that the NAFTA Parties consented to submit to arbitration."). *See also* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 5, 13; Dhooge, *supra* note 48, at 213; Mann, *supra* note 47, at 405; Tollefson, *supra* note 24, at 184; Ferguson, *supra* note 40, at 503; Ganguly, *supra* note 17, at 153; Lalonde, *supra* note 2; Runnalls & Mann, *supra* note 47; Stokes, *supra* note 48.

While many of the accusations are directed against perceived attempts to prevent governments from discharging core regulatory functions, others suggest that investors

arguably, two tribunals, claimants respond that requests for, and performance of, heightened judicial review of awards represents an illegitimate encroachment onto the jurisdiction of Chapter 11 tribunals,[67] and that the Notes constitute an *ultra vires* amendment of NAFTA.[68] Because they appear to rest on strongly held

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have brought claims not falling within the definition of "investment disputes." For example, in three cases, Canada argued (unsuccessfully) that the claims actually involved disputes about trade in goods or services, which fall within the state-to-state remedial process of Chapter 20. *See S.D. Myers*, Partial Award, *supra* note 40, paras. 236, 294-95, 297; Pope & Talbot v. Canada, Award in Relation to the Preliminary Motion by the Government of Canada (Jan. 26, 2000), paras. 19(3), 27-34, *at* http://www.appletonlaw.com/4b3P&T.htm [hereinafter *Pope & Talbot*, Award in Relation to the Preliminary Motion by the Government of Canada]; Ethyl Corp. v. Canada, Award on Jurisdiction (June 24, 1998), para. 62-64, 38 I.L.M. 708, 725 (1999) [hereinafter *Ethyl Corp.*, Award on Jurisdiction].

66. *See S.D. Myers*, Canada's Memorandum of Fact and Law, *supra* note 59, paras. 135, 137, 196; *S.D. Myers*, Mexico's Memorandum of Fact and Law, *supra* note 59, paras. 4, 19, 26-29, 47-55, 60-61, 101-06, 133-42; Mexico's Outline of Argument (*Metalclad*), *supra* note 23, paras. 46, 48, 59, 96, 227-28, 242, 248, 250, 262-63, 266-73, 310-11; Canada's Outline of Argument (*Metalclad*), *supra* note 58, paras. 25-32, 65, 69, 72-74, 77. *See also* Afilalo, *supra* note 2, at 51-52; Dhooge, *supra* note 48, at 279; Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT'L L. 213, 221 (2001); Tollefson, *supra* note 17, at 163; Beauvais, *supra* note 2, at 246-47, 262; Lalonde, *supra* note 2; Mann & von Moltke, *manuscript*, *supra* note 3, at 19.

67. *See* Pope & Talbot, Inc. v. Canada, Ruling Concerning Investor's Motion to Change Place of Arbitration (Mar. 14, 2002), paras. 3-8, 17-20, *at* http://www.dfait-maeci.gc.ca/tna-nac/ruling-investor-motion.pdf [hereinafter *Pope & Talbot*, Ruling Concerning Investor's Motion to Change Place of Arbitration]; United Parcel Serv. of Am. v. Canada, Decision of the Tribunal on the Place of Arbitration (Oct. 17, 2001), paras. 8-9, 11, *available at* http://www.dfait-maeci.gc.ca/tna-nac/PA_oct.pdf [hereinafter *United Parcel*, Decision of Tribunal on the Place of Arbitration]; *In re* Arbitration Under Chapter 11 of NAFTA Between S.D. Myers, Inc. and Gov't of Canada, Respondent's Memorandum of Fact and Law (Dec. 13, 2001), paras. 42, 44, 50-51, (Can. Fed. Ct. 2001) (on file with author); *In re* Arbitration Under Chapter 11 of NAFTA Between S.D. Myers, Inc. and Gov't of Canada, Respondent's Reply to Intervenor's Memorandum (Feb. 12, 2002), paras. 10-25, (Can. Fed. Ct. 2001) (on file with author). *See also* Brower, *Beware the Jabberwock*, *supra* note 2, at 476-87; Brower, *Empire Strikes Back*, *supra* note 2, at 66-68, 81-88; William S. Dodge, *International Decision*, 95 AM. J. INT'L L. 910, 916 (2001).

Likewise, another tribunal mildly criticized Canada's baseless application to "suspend the arbitration" pending judicial review of its partial-final award. *See* S.D. Myers, Inc. v. Canada, Procedural Order No. 18 (Feb. 26, 2001), paras. 8-11, 14-17 (NAFTA/UNCITRAL), *at* http://www.appletonlaw.com/4b2myers.htm.

68. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 17-24, 43-47, 47 n.37; ADF Group, Inc. v. United States, Post-Hearing Submission of Claimant on NAFTA Article 1105(1) and the Damages Award in *Pope & Talbot and Canada* (July 11, 2002), para. 49, *at* http://www.naftaclaims.com [hereinafter Claimant's Post Hearing Submission (*ADF*)]; ADF Group, Inc. v. United States, Investor's Reply to Countermemorial of United States on Competence and Liability (Jan. 28, 2002), paras. 213-20, *at* http://www.state.gov/documents/organization/7920.pdf; Methanex Corp. v. United States, Letter from Claimant to Tribunal (Sept. 18, 2001), at 1-3, 17-20, *available at* http://www.state.gov/documents/organization/6057.pdf [hereinafter *Methanex*, Claimant's Letter Brief]; Methanex Corp. v. United States, Second Opinion of Professor Sir Robert Jennings, Q.C. (Sept. 6, 2001), at 4-5, *at* http://www.naftaclaims.com [hereinafter *Methanex*, Second Opinion of Professor Sir Robert Jennings]. *See also* Brower, *Beware the Jabberwock*, *supra* note 2, at 476-87;

convictions, these reciprocal allegations threaten the viability of Chapter 11 and bode ill for its suitability as a model for the FTAA's investment chapter. As noted above, similar controversies already scuttled the draft Multilateral Agreement on Investment.[69] To improve the future prospects for multilateral investment regimes, the remainder of this Article abandons the cycle of recrimination and seeks instead to initiate a productive discourse about the elements of legitimacy and their presence or absence at critical junctures of the Chapter 11 process.

III. ELEMENTS OF LEGITIMACY

The most highly qualified writers agree that international legal regimes depend for their survival on perceptions of legitimacy,[70] which pull states and other participants toward voluntary compliance with rules, as well as the decisions that interpret rules.[71] To generate perceptions of legitimacy, legal regimes must operate predictably, conform to historical practice, and incorporate fundamental values shared by the governed community. For reasons stated below, the *widespread* absence of such characteristics may push international legal regimes to the brink of rejection and failure.[72]

Brower, *Empire Strikes Back*, *supra* note 2, at 56-57 n.71; Weiler, *supra* note 3, at 429; Mann & von Moltke, *manuscript*, *supra* note 3, at 13-14.

69. *See supra* note 3.

70. *See* David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 554, 566-67 (1993); Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 66, 84 (1997); Thomas M. Franck, *Fairness in the International Legal and Institutional System*, 240 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 9, 26, 41 (1993 III) [hereinafter Franck, *Fairness*]; Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705-06 (1988) [hereinafter Franck, *Legitimacy*]. *See also* Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT'L & COMP. L. 117, 127 (1997); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 401.

71. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16, 49 (1990); Franck, *Fairness*, *supra* note 70, at 41. *See also* Tom J. Farer, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 359, 361 (2002) ("A process of decision making constitutes a normative system only when those affected believe that in general they have an obligation to obey its results; in other words, compliance with outputs of the process results at least in part from perceptions that it is legitimate."); Hyde, *supra* note 70, at 380-81 ("In the sense in which it is most often encountered, the 'legitimacy' of a social order is the effective belief in its binding or obligatory quality.").

72. Because virtually no regime enjoys universal support, isolated perceptions of illegitimacy are normal and pose no threat to the survival of a regime. *See* Caron, *supra* note 70, at 558-59. True crises develop only when extremely influential actors or large groups of actors come to perceive a regime as illegitimate. *See id.*

A. *Predictability*

If one defines legitimacy in terms of qualities that pull the subjects of regulation toward voluntary compliance, international legal regimes that make arbitrary demands necessarily lack legitimacy because they transform compliance into a random, haphazard event. By contrast, international legal regimes that operate predictably seem more likely to possess legitimacy because they give subjects a meaningful opportunity to understand, and conform their behavior to, systemic requirements.[73] Because predictability thus supplies the necessary foundation for legitimacy, one must identify the circumstances that enable the predictable operation of legal regimes.[74]

Borrowing from Professor Thomas Franck's vocabulary, one may describe "determinacy" and "coherence" as the foundation of predictable legal regimes.[75] "Determinacy" refers to the ability of legal regimes to transmit clear signals about required standards of conduct.[76] Such clarity encourages predictable behavior both by providing states with a roadmap and by limiting their capacity to avoid compliance through elastic interpretations.[77] "Coherence," by contrast, means the potential to transmit consistent signals about required standards of conduct.[78] To the extent that international legal regimes send conflicting messages, they earn the reputation of arbitrary, unpredictable, and, thus, illegitimate systems.[79]

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73. *See* FRANCK, *supra* note 71, at 52; Franck, *Fairness*, *supra* note 70, at 50; Franck, *Legitimacy*, *supra* note 70, at 713. *See also* Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 710 (1999) (explaining that "predictability of a dispute resolution regime is very important to its users because it creates confidence in the system"); Byrne, *supra* note 49, at 420 (reiterating that "less certainty means a loss of the pact's legitimacy").

74. *See* FRANCK, *supra* note 71, at 234 (referring to the "secular political community's preference for, and dependence on, order and predictability").

75. *See id.* at 52 (identifying "determinacy" and "coherence" as two of the four indicators of rule legitimacy).

76. *Id.* at 52; Franck, *Fairness*, *supra* note 70, at 48; Franck, *Legitimacy*, *supra* note 70, at 713.

77. *See* FRANCK, *supra* note 71, at 52-54, 57; Franck, *Fairness*, *supra* note 70, at 48-50; Franck, *Legitimacy*, *supra* note 70, at 713-14, 716.

78. *See* FRANCK, *supra* note 71, at 142, 174; Franck, *Fairness*, *supra* note 70, at 54-55; Franck, *Legitimacy*, *supra* note 70, at 738, 741, 750.

79. *See* FRANCK, *supra* note 71, at 60 (explaining that "a high degree of textual determinacy goes together with a high degree of rule-conforming state behavior"), 142 (stating that "coherence is essential to legitimacy"); Franck, *Legitimacy*, *supra* note 70, at 716 (observing that the "degree of determinacy of a rule directly affects the degree of its perceived legitimacy"), 741 (describing coherence as "a key factor in explaining why rules compel"). *See also* Charney, *supra* note 70, at 66, 77, 81, 84-86, 89 (warning that substantial variations in the application of rules may undermine the coherence and legitimacy of international law); J. Patrick Kelly, *The Twilight of Customary*

To some extent, international legal regimes may achieve predictable operation through the adoption of determinate and coherent treaty texts.[80] Nevertheless, substantive disagreements,[81] bounded rationality, and the complexity of international relations inevitably require the inclusion of certain vague, flexible, and conflicting provisions whose application and reconciliation may depend on the facts of individual cases. Although such provisions reduce textual determinacy and coherence, legal regimes can still maintain predictability by developing interpretive processes that yield determinate and coherent results.[82]

B. *Historical Practice and Shared Values*

If predictable operation supplies the necessary foundation for the legitimacy of international legal regimes, conformity to historical practice and incorporation of shared values provide the load-bearing walls.[83] As explained below, these elements enhance the legitimacy of textual rules and interpretive processes by reinforcing their

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International Law, 40 VA. J. INT'L L. 449, 451 (2000) (arguing that customary international law has become "a matter of taste" and, therefore, "cannot function as a legitimate source of substantive legal norms"); Okafor, *supra* note 70, at 133 (stating that if institutions apply the same rule inconsistently to multiple, similar situations, "the decisions will seem selective" and illegitimate); Paul B. Stephan, *Redistributive Litigation: Judicial Innovation, Private Expectations and the Shadow of International Law*, 88 VA. L. REV. 789, 797 (2002) (arguing that courts with a history of disregarding precedent will suffer a diminished capacity to shape future behavior).

80. *See* Franck, *Legitimacy*, *supra* note 70, at 713 (describing textual determinacy as "the most self-evident of all characteristics making for legitimacy"). *See also* FRANCK, *supra* note 71, at 52, 60, 66; Franck, *Fairness*, *supra* note 70, at 48.

81. *See* FRANCK, *supra* note 71, at 52 (observing that clarity may "reflect the degree of agreement among a rule's authors").

82. *See id.* at 61, 66 (explaining that rules "with low textual determinacy may overcome that deficit" if they remain subject to clarification by a process "recognized as legitimate by those to whom the rule is addressed"); Franck, *Legitimacy*, *supra* note 70, at 724 (proposing to reduce the costs of indeterminacy by relying on "process determinacy" to introduce a forum that will resolve ambiguity "case by case"). *See also* Franck, *Legitimacy*, *supra* note 70, at 750 (indicating that rules may achieve coherence "when they are *applied* so as to preclude capricious checkerboarding") (emphasis added).

83. *See* José E. Alvarez, *The Quest for Legitimacy: An Examination of "The Power of Nations" by Thomas M. Franck*, 24 N.Y.U. J. INT'L L. & POL. 199, 244 (1991) (identifying the "widely accepted notion that legal institutions and laws project values and that these values are accepted because they converge with those of the actors, which in turn serves to legitimate them"); Hyde, *supra* note 70, at 403, 412-13 (observing that, under the model of substantive legitimation, rules derive their impact from correspondence to rules already held by the population); Kelly, *supra* note 79, at 456 (stating that the "community's acceptance of norms . . . confers legitimacy on them"). *See also* Mark Killian Brewer, *The European Union and Legitimacy: Time for a European Constitution*, 34 CORNELL INT'L L.J. 555, 578 (2001) (identifying "tradition" as a basis of legitimacy).

predictability,[84] and by weaving them into the temporal and ideological structure of the regulated communities.[85]

Borrowing, again, from Professor Franck's vocabulary, one may describe conformity with historical practice in terms of "pedigree" and "ritual."[86] While both concepts provide a sense of continuity, the former does so more explicitly than the latter. Thus, pedigrees represent symbolic devices that establish obvious connections between historical models and existing regimes,[87] thereby increasing the legitimacy of the latter in two ways. First, because pedigrees require adherence to historical models, they increase the tendency of existing regimes to follow established—that is, predictable—patterns.[88] Second, because pedigrees function like trademarks, they can signal that a regime's format has already achieved a reputation for quality and a tradition of voluntary compliance, both of which may support a presumption of future compliance.

"Rituals" involve ceremonies that have evolved over time and that also promote legitimacy in two ways.[89] First, to the extent that they contemplate the repetition of familiar behaviors, rituals reinforce the predictable operation of legal regimes.[90] Second, in most legal regimes, rituals provide unstated reasons for compliance with textual rules or the product of interpretive processes.[91] For example, in the United States, judges wear black robes to emphasize

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84. Thus, to a certain extent, conformity to historical practice and shared values represents an amplification of the modern, secular community's quest for order and predictability. *See supra* note 74 and accompanying text.

85. *See* Alvarez, *supra* note 83, at 252 (stating that "international actors are driven to prior institutions and norms evincing legitimacy which in turn reinforce the legitimacy cycle").

86. In other words, "ritual" and "pedigree" supply legitimacy's "cultural and anthropological dimension." FRANCK, *supra* note 71, at 91; Franck, *Legitimacy*, *supra* note 70, at 725.

87. *See* FRANCK, *supra* note 71, at 94 (explaining that pedigrees "pull[ ] toward rule compliance by emphasizing the deep rootedness of . . . rule[s] or the rule-making" institutions and by "emphasizing . . . venerable historic . . . social origins and continuity"); Franck, *Fairness*, *supra* note 70, at 53 (observing that the "law extends a particular veneration to rules that have withstood the test of time"); Franck, *Legitimacy*, *supra* note 70, at 726-27 (noting that "[t]he compliance pull of a rule is enhanced by a demonstrable lineage").

88. *See* Alvarez, *supra* note 83, at 237 (concluding that Professor Franck's theory of legitimacy "favor[s] those rules on which states agree *at the present time*"). *Cf.* Stephan, *supra* note 79, at 801 (suggesting that the regular observance of property and contract law serves the purpose of "honoring widely held expectations" and that the absence of such traditional, predictable rules would make life "incoherent and morally arbitrary").

89. *See* FRANCK, *supra* note 71, at 92 (defining "rituals" as a "specialized form of symbolic validation marked by ceremonies"). *See also* Kelly, *supra* note 79, at 497 (noting that rituals "confer authority").

90. In other words, rituals use symbols to communicate and perpetuate the beliefs and values of legal regimes. *See* FRANCK, *supra* note 71, at 93.

91. *See id.* at 92.

both the power of the state and the respect that an independent, professional judiciary has earned over the course of two centuries.[92] Likewise, in international arbitration, the selection of party-appointed arbitrators increases the likelihood of compliance by providing an opportunity to recruit decisionmakers who possess relevant expertise and enjoy the confidence of the parties. Finally, in adjudication of all sorts, oral hearings increase the likelihood of compliance by guaranteeing that the decisionmakers have, in fact, received and considered the parties' submissions.

In order for pedigrees and rituals to promote legitimacy, however, the members of the governed community must believe that current practices do, in fact, conform to historical models.[93] For example, if the current Iraqi regime were to adopt the text of the U.S. Constitution verbatim, the pedigree would fail because current Iraqi practice manifestly departs from the historical model. Likewise, rituals cannot enhance legitimacy when the officiants deviate significantly from tradition[94] or perform rituals to promote self-interest.[95] For example, U.S. judges who take the bench without their robes may fail to command respect, just as their robes would elicit expressions of scorn or amusement if worn to the beach. Likewise, the decisions of judges in their own divorce proceedings would command no respect.[96] Thus, when designing new legal regimes, one must beware of the temptation to adopt pedigrees and rituals formed under different circumstances, and one must ensure that important decision-making rituals avoid perceptions of self-interest. If significant gaps appear between models and reality, the

92. *See* Hyde, *supra* note 70, at 405 ("The population was induced to follow its leaders partly because of the form of legal decisions—the accompanying ritual and majesty.").

93. *See* FRANCK, *supra* note 71, at 117, 120, 127-28, 134. *See also* Martti Koskenniemi, *The Power of Legitimacy Among Nations*, 86 AM. J. INT'L L. 175, 176 (1992) (noting that "if symbols clash with what is perceived as . . . true, they undermine themselves").

94. *See* FRANCK, *supra* note 71, at 134; Franck, *Legitimacy*, *supra* note 70, at 735-36, 738.

95. *See* Caron, *supra* note 70, at 561 (observing that legitimacy requires procedural integrity, which requires that officials be independent of the governed and "have no interest in a particular outcome"). *See also* Schneider, *supra* note 73, at 737-38 (indicating that international organizations derive their legitimacy, in part, from their perceived "neutrality" and "independence" in resolving disputes). Thus, decisionmakers who wish to achieve legitimacy must act in a "disinterested, principled fashion" and must avoid the perception of gratifying self-interest. FRANCK, *supra* note 71, at 64; Franck, *Legitimacy*, *supra* note 70, at 725.

96. *Cf. In re* W. Stephen Thayer, III: Report of the Attorney General 12-21 (Mar. 31, 2000), *at* www.state.nh.us/nhdoj/Press%20Release/reportonthayer.pdf (discussing a state supreme court justice's attempt to influence the appointment of a judge in his own divorce proceedings and his subsequent resignation in the face of a criminal investigation).

symbols will lose their "magic" and the regimes may be accused of making false pretensions to legitimacy.[97]

Like strict conformance to historical practice, the incorporation of shared values enhances legitimacy in two ways.[98] First, the incorporation of such values increases the likelihood that institutions will formulate, interpret, and apply rules in predictable ways.[99] Second, the incorporation of shared values promotes voluntary compliance by establishing a sense of harmony between legal regimes and the ideologies of governed communities.[100] For example, the international community increasingly values the principles of accountability,[101] transparency,[102] and democratic participation.[103]

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97. FRANCK, *supra* note 71, at 127-28, 134.

98. Professor Franck uses the term "adherence" to describe this concept. *See* Franck, *Fairness*, *supra* note 70, at 57.

99. *See* FRANCK, *supra* note 71, at 184 (explaining that "a rule is more likely to obligate if it is made within the framework of an organized normative hierarchy[ ] than if it is merely an *ad hoc* agreement between parties in a state of nature").

100. *See* Franck, *Fairness*, *supra* note 70, at 57 (observing that "rules are better able to pull towards compliance if . . . they are supported by the procedural and institutional framework within which the community organizes itself").

101. *See, e.g.*, Caron, *supra* note 70, at 561 (suggesting that accountability promotes integrity, which in turn supports legitimacy); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 N.W. J. INT'L L. & BUS. 681, 682 (1996-1997) (indicating that free and democratic societies "regard accountability as fundamental"); Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1562, 1578 (1999) (stating that "the international process suffers from an accountability deficit," which "affects the content of rules and puts their legitimacy into question"); Beauvais, *supra* note 2, at 262-63 (describing "accountability" as one of the traits upon which judicial legitimacy rests). Accountability also supports legitimacy by increasing the likelihood that decisionmakers will follow prescribed rituals and render coherent decisions.

102. *See, e.g.*, John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 547, 574, 603 (2000) (stating that transparency both restrains the power of interest groups and levels the playing field, and calling on the WTO to adopt the "attributes of transparency associated with proper adjudication"); Schneider, *supra* note 73, at 703 (concluding that transparency "has become an important factor in assessing the legitimacy of international organizations"). Transparency also supports legitimacy by increasing determinacy and allowing participants to monitor compliance with rituals. *See* McGinnis & Movsesian, *supra*, at 574 (explaining that transparency requires the publication of regulations and, thereby, clarifies the steps required for compliance); Schneider, *supra* note 73, at 710 (indicating that transparency increases the predictability of systems for dispute resolution).

103. *See, e.g.*, Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 455, 457 (2001) (complaining that "[t]he WTO receives no democratic input" and "places a large sphere of economic activity beyond the reach of ordinary politics"); Caron, *supra* note 70, at 561 (indicating that the "opportunity for representative participation" promotes integrity, which in turn supports legitimacy); Kelly, *supra* note 79, at 453, 517, 523 (arguing, in part, that the formulation of customary international law "lacks procedural legitimacy" because it "violates the basic notion of democratic governance among states and is a particularly ineffective way to generate substantive norms that will commend compliance"); Brewer, *supra* note 83, at 578-79 (quoting K.C. WHEARE, MODERN CONSTITUTIONS 54-55 (2d ed. 1966), for the proposition that

Therefore, the use of accountable and transparent institutions to formulate and interpret rules should increase voluntary compliance with—and, thus, the legitimacy of—international legal regimes. Similarly, the creation of opportunities for democratic participation should increase voluntary compliance and legitimacy, while the maintenance of unjustified power imbalances should have the opposite effect.[104] Although the failure to incorporate such values may not immediately incapacitate legal regimes, the resulting legitimacy deficits can encourage governed communities to divert important issues to alternative regimes.[105]

To recapitulate, the legitimacy of international legal regimes depends on predictable operation, conformity to historical practice, and the incorporation of fundamental values shared by members of the governed community.[106] Determinacy and coherence lay the necessary foundation by establishing the existence of a predictable system.[107] Conformance to historical practice and the incorporation of shared values reinforce legitimacy by weaving that system into the

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"[c]onstitutions generally validate themselves as basing their legitimacy upon 'the people' of a particular state").

104. Professor Caron identifies power imbalances as a source of the perceived illegitimacy of the U.N. Security Council. *See* Caron, *supra* note 70, at 562-63; David D. Caron, *Strengthening the Collective Authority of the Security Council*, 87 AM. SOC'Y INT'L L. PROC. 303, 305-06 (1993).

105. For example, the U.N. Security Council and the International Criminal Court (ICC) both have the competence to address certain forms of widespread violence that present a threat to international peace and security. The United States and other permanent members supported proposals for robust Security Council control over the ICC. *See* Lara A. Ballard, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. 143, 154-55 (1997); Christopher Keith Hall, *Current Development: The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177, 181, 182 (1997); Jelena Pejic, *The United States and the International Criminal Court: One Loophole Too Many*, 78 U. DET. MERCY L. REV. 267, 283-84 (2001); David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 13 (1999). Many other states balked at such proposals. *See* Hall, *supra*, at 181, 182; Pejic, *supra*, at 283-84; Scheffer, *supra*, at 14. This may reflect a principled opposition to political interference with judicial processes. *See* Hall, *supra*, at 181; Pejic, *supra*, at 283-84. Perhaps it also reflects dissatisfaction with the Security Council's structure and operation and, therefore, represents an attempt to divert certain issues to an alternative forum. *See* Diane F. Orentlicher, *Politics by Other Means: The Law of the International Criminal Court*, 32 CORNELL INT'L L.J. 489, 496 (1999) (describing India's opposition to Security Council control over the ICC as a revolt against the Security Council's unbalanced structure and a "claim about the proper allocation of political authority at the dawn of a new century"); Paul C. Szasz, *The United States Should Join the International Criminal Court*, 9 USAFA J. LEG. STUD. 1, 3 (1998/1999) (indicating that many states did not consider the Security Council "sufficiently representative" to control the work of the ICC).

106. *See supra* notes 73-105 and accompanying text.

107. *See supra* notes 73-82 and accompanying text.

traditions and ideology of the governed community.[108] While legal regimes cannot achieve legitimacy without predictable operation, they may do so in the absence of either conformity to historical practice *or* incorporation of fundamental values. For example, new institutions may achieve legitimacy by incorporating the increasingly shared values of accountability, transparency, and democratic participation.[109] Conversely, established regimes may, for a time, use their pedigrees to maintain legitimacy despite their failure to incorporate increasingly shared values of the international community.[110] While one may not, therefore, describe either conformity to historical practice or incorporation of fundamental values as a necessary condition of legitimacy, one still might characterize them as necessary alternatives. If a legal regime lacks a meaningful connection to both the traditions and the ideology of the governed community, its predictable operation may not be sufficient to generate widespread perceptions of legitimacy.[111]

IV. LEGITIMACY AND THE STRUCTURE OF NAFTA'S INVESTMENT CHAPTER

Because claimants, the NAFTA Parties, and arbitral tribunals have all become targets of sincere and sustained criticism, one must explore the possibility that NAFTA's investment chapter

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108. *See supra* notes 83-105 and accompanying text.

109. *See* Alvarez, *supra* note 83, at 238 n.185 (recognizing that some observers view the absence of pedigrees or rituals as "not necessarily determinative" of legitimacy or illegitimacy). For example, while the increasing participation of civil society in the formation of international law contradicts many traditional tenets, the process seems to have accumulated a high degree of legitimacy due to the perceived benefits for transparency, accountability, and democratic values. *See* Tollefson, *supra* note 17, at 142-43 (describing the transformation of non-state actors into "increasingly formidable players" that are "beginning to reshape the norms and procedures of international relations" and "forcing the rules in [that] arena to change").

110. For example, people frequently criticize the U.N. Security Council and the European Union for their lack of democratic legitimacy. *See, e.g.*, Caron, *supra* note 70, at 562-66 (discussing criticisms of the Security Council); Patrick Fitzmaurice, Attorney General v. X: *A Lost Opportunity to Examine the Limits of European Integration*, 27 BROOK. J. INT'L L. 1723, 1734-35 (2001) (describing the EU's "democracy deficit"). Yet, due in no small part to their pedigrees, those two institutions operate tolerably well and are certain to do so for the foreseeable future.

111. *See* Koskenniemi, *supra* note 93, at 176 ("Mere clarity may not suffice to create legitimacy. . . ."). For example, an authoritarian regime based on fear could not retain legitimacy over time even if it incorporated determinate and coherent rules. *See* Farer, *supra* note 71, at 361 ("If fear alone secured compliance, I would not call the decision-making process normative, although it might possibly be effective for a time."). Perhaps for this reason, the Soviet regime tried to use both the prospective development of ideology and the retrospective pedigree of Russian nationalism to boost its legitimacy. The regime ultimately failed due, in part, to the ideology's failure to take root and the governed community's rejection of Russian nationalism as a true pedigree for communism.

affirmatively encourages each group to perform acts of questionable legitimacy at various stages of the arbitral process. To this end, Part IV examines the junctures at which each group seems most vulnerable to allegations of illegitimate conduct. While recognizing that Chapter 11's drafters apparently took measures to overcome legitimacy problems, it suggests that the remedies frequently prove more troublesome than the disease. For example, to resolve problems of textual indeterminacy, Chapter 11 supplies an arbitral process that generates incoherent rulings on a key provision, lacks an accepted pedigree, arguably seems prone to deviations from ritual, and evidently fails to incorporate the fundamental values of the governed community.[112] Similarly, to ensure that tribunals comply with rituals, to increase the coherence of their decisions, and to promote accountability, Chapter 11 establishes two control mechanisms that seem equally, if not more, incapable of resolving incoherence, predisposed to disregard ritual for reasons of self-interest, and isolated from the governed community's fundamental values.[113] Further complicating matters, Chapter 11 introduces a sort of constitutional indeterminacy by establishing no clear division of labor between tribunals, municipal courts, and the Free Trade Commission.[114] Thus, despite its seemingly classic architecture, Chapter 11 seems destined to invite conduct of questionable legitimacy and, possibly, its own demise.

A. *Legitimacy and Claimants: Villains or Scapegoats for Textual Indeterminacy?*

Popular accounts depict claimants as villains who have pushed Chapter 11 beyond its intended scope, transforming a defensive tool into an offensive weapon[115] that threatens the capacity of governments to regulate in the public interest.[116] Although certain claims may strain the bounds of legitimacy, the problem lies not in the perverse appetites of investors but in the treaty's indeterminate text.

Observers commonly refer to the "broad," "vague," or "uncertain" provisions of Chapter 11,[117] which leave abundant room for

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112. *See infra* notes 142-202 and accompanying text.

113. *See infra* notes 203-43 and accompanying text.

114. *See infra* notes 244-67 and accompanying text.

115. *See supra* note 48 and accompanying text.

116. *See* PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 1; Banks, *supra* note 50, at 499; Clarkson, *supra* note 2, at 377, 379; Dhooge, *supra* note 48, at 213, 276-77; Nogales, *supra* note 48, at 131-32; Soloway & Broadhurst, *supra* note 2, at 389; Tollefson, *supra* note 24, at 185; Beauvais, *supra* note 2, at 263-64; Ganguly, *supra* note 17, at 114; Lalonde, *supra* note 2.

117. *See, e.g.*, MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 6, 8, 15, 18-19, 44, 60; PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 9, 23; Afilalo,

interpretive debate about the jurisdiction of tribunals, the scope of the chapter's coverage, and the type of conduct prohibited or required by substantive disciplines. For example, while the treaty describes the execution of written consents and waivers as "conditions precedent" to submission of a claim to arbitration,[118] it does not specify whether execution represents a condition precedent to the tribunal's jurisdiction[119] or merely to admissibility of the claim.[120] Likewise, while Chapter 11's scope extends to measures "relating to" investors and investments,[121] it does not specify whether tribunals should construe that term broadly to mean "affecting" investors and investments[122] or narrowly to mean "primarily aimed at" investors and investments.[123] In addition, while Chapter 11 regulates measures "tantamount to expropriation,"[124] it does not specify whether that term reflects the concept of "creeping expropriation" as defined by customary international law, or establishes a more demanding *lex specialis* for the North American region.[125] Furthermore, while Chapter 11 requires national treatment for investors and investments "in like circumstances,"[126] it does not specify whether tribunals should use market sector, production

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supra note 2, at 4; Banks, *supra* note 50, at 508, 509; Cremades & Cairns, *supra* note 3, at 194, 195; Dhooge, *supra* note 48, at 281, 284; Gantz, *supra* note 40, at 658, 675-76; Gantz, *supra* note 3, at 341; Herman, *supra* note 40, at 134; Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA L. & BUS. REV. AM. 82, 85 (1996); Scott Philip Little, *Canada's Capacity to Control the Flow: Water Export and the North American Free Trade Agreement*, 8 PACE INT'L L. REV. 127, 145, 158 (1996); Mann, *supra* note 47, at 403; Daniel M. Price, *Chapter 11—Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 109 (2000); Price, *Overview of the NAFTA Investment Chapter*, *supra* note 42, at 736; Gloria Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 323 (1994); Soloway, *Challenge of Private Party Participation*, *supra* note 3, at 13; Tollefson, *supra* note 24, at 213-14; Beauvais, *supra* note 2, at 257; Ganguly, *supra* note 17, at 121; Luke Eric Peterson, *Investor Rights and Wrongs*, TORONTO STAR, June 14, 2002, at A22, *available at* 2002 WL 22720920.

118. *See* NAFTA, *supra* note 1, art. 1121.

119. *See Ethyl Corp.*, Award on Jurisdiction, *supra* note 65, para. 89 (recounting Canada's argument).

120. *See id.* paras. 74-75 (recounting the investor's argument).

121. *See* NAFTA, *supra* note 1, art. 1101.

122. *Pope & Talbot*, Award in Relation to the Preliminary Motion by the Government of Canada, *supra* note 65, para. 29 (setting forth the investor's argument).

123. *Id.* paras. 27-28 (setting forth Canada's argument).

124. *See* NAFTA, *supra* note 1, art. 1110(1).

125. *See* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 43-44; Price, *supra* note 117, at 111; Thomas, *supra* note 23, at 104. Several investors have relied on the latter view in advancing claims for expropriation. *See S.D. Myers*, Partial Award, *supra* note 40, para. 285; *Metalclad*, Award, *supra* note 54, para. 27; *Pope & Talbot*, Interim Award, *supra* note 51, para. 84.

126. *See* NAFTA, *supra* note 1, arts. 1102(1), (2).

methods, or physical location as relevant points for comparison.[127] Similarly, while Chapter 11 requires host states to provide "fair and equitable treatment" in accordance with international law,[128] it does not identify the hallmarks of fairness and equity. Finally, while Chapter 11 recognizes the authority of host states to perform public health "functions"[129] and to adopt "measures" to protect the environment,[130] it fails to specify how that authority relates to, or possibly qualifies, the substantive obligations of host states.[131] In short, Chapter 11 in significant measure lacks textual determinacy.[132]

Faced with this degree of textual indeterminacy, Chapter 11 claimants have predictably, and quite rationally, interpreted ambiguities to their greatest advantage.[133] Thus, they have at various times contended that Chapter 11's procedural requirements lack jurisdictional significance,[134] that Chapter 11 applies to all measures that "affect" investments,[135] and that Chapter 11 creates uniquely high levels of legal protection for cross-border investment.[136] Wrapped into a single package, these arguments suggest that

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127. *See, e.g.*, ADF Group, Inc. v. United States, Memorial of the Investor (Aug. 1, 2001), para. 130, *available* at http://www.state.gov/ documents/organization/5964.pdf [hereinafter Memorial of the Investor (*ADF*)] ("The phrase 'in like circumstances' is open to a wide variety of interpretations both in the abstract and in the context of a particular dispute."). *See also* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 29-30 (noting the lack of understanding about the relevant factors for defining "like circumstances" in the context of long-term investments); PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 26 (identifying the lack of understanding about the appropriate definition of "like circumstances" in the investment context); Paterson, *supra* note 3, at 92-95 (discussing possible constructions of the phrase "in like circumstances"); Mann & von Moltke, *manuscript*, *supra* note 3, at 9-10 (examining the interpretative questions raised by Chapter 11's provisions on national treatment).

128. *See* NAFTA, *supra* note 1, art. 1105(1).

129. *See id.* art. 1101(4).

130. *See id.* art. 1114(1).

131. *See supra* notes 19-20 and accompanying text.

132. *See* Soloway, *Challenge of Private Party Participation*, *supra* note 3, at 3 (asserting that the "lack of clarity . . . in Chapter 11 prevents the establishment of a secure and stable framework for investments").

133. *See* Soloway & Broadhurst, *supra* note 2, at 404 ("There should be no surprise that claimants continue to push the edges of the definition of expropriation in order to obtain compensation."). *See also* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 14 (observing that foreign investors "have no other interest to consider than their own operations and profits"); Afilalo, *supra* note 2, at 4 (presuming that claimants act in accordance with their economic interests). While some observers have urged investors to exercise greater caution, that seems unrealistic. *See* Price, *supra* note 117, at 114 (urging counsel to use caution in framing their claims and to refrain from pushing Chapter 11 "too far").

134. *See Ethyl Corp.*, Award on Jurisdiction, *supra* note 65, paras. 74-75.

135. *Pope & Talbot*, Award in Relation to the Preliminary Motion by the Government of Canada, *supra* note 65, para. 29 (setting forth the investor's argument).

136. *See S.D. Myers*, Partial Award, *supra* note 40, para. 285; *Metalclad*, Award, *supra* note 54, para. 27; *Pope & Talbot*, Interim Award, *supra* note 51, para. 84.

Chapter 11 provides unlimited access to an international forum for attacking all democratically-adopted measures that interfere with the performance of investments.[137] Taken to extremes, this view depicts host states as helpless victims of mighty investors.[138] This apparent inversion of reality[139] and frustration of the democratic process[140] naturally generate concerns about the legitimacy of Chapter 11.

While aggressive and unsettling claims may represent an obvious symptom of illegitimacy, they do not constitute its source. The root of the problem lies not in the purportedly avaricious hearts of investors but in textual indeterminacy created by the NAFTA Parties. Yet one should not judge the legitimacy of Chapter 11 based

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137. *See Loewen Group*, Notice of Claim, *supra* note 46, para. 164 (defining expropriation to include all government action that "interferes with an alien's use or enjoyment of property"). *See also* José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 307 (1997) (asserting that NAFTA's investment chapter has given foreign investors "direct access to binding denationalized adjudication of any governmental measure that interferes with their ample rights"); Banks, *supra* note 50, at 504 (explaining that some consider Chapter 11 to provide investors with "an indemnity against the risk of economic loss due to at least some forms of regulation"); Clarkson, *supra* note 2, at 376 ("NAFTA's major innovation in the service of corporate empowerment was to extend investors' rights to include the capacity of a firm . . . to challenge a [host] government's . . . legislation for virtually any measure that jeopardizes the company's profitability."); Nogales, *supra* note 48, at 112 (suggesting that Chapter 11 imposes liability for all measures that "reduce or limit the value of . . . private commercial property"); Tollefson, *supra* note 17, at 148 (describing the perception of Chapter 11 "as a Bill of Rights for transnational corporations" that creates a "right to sue host governments for enacting *bona fide*, non-discriminatory public health and environmental regulations"); Ganguly, *supra* note 17, at 152 (describing Chapter 11 as a "tool for attacking any legislation or regulation that [investors] do not find beneficial").

138. *See* Nogales, *supra* note 48, at 133 (suggesting that Chapter 11 enables investors to "intimidate" lawmakers). Investment treaties create perceptions of "helpless sovereignty" by providing investors with liberal access to a forum in which to pursue claims, but providing host states with no corresponding right to seek arbitration against investors. *See* Cremades & Cairns, *supra* note 3, at 189. *See also* PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 19. *But see* Levin & Marin, *supra* note 117, at 92 (suggesting that Chapter 11 does not expressly preclude counter-claims). Tribunals may enhance such perceptions by penalizing host states for attempts to retaliate against investors who invoke the machinery of investor-state arbitration. *Pope & Talbot*, Award on the Merits of Phase 2, *supra* note 51, at paras. 156-81.

139. *See* Stephan, *supra* note 79, at 803-04 (discussing "reverse paternalism," which "depicts government as the victim based on theories of improper private interference with the exercise of regulatory power" and "inverts a political order that presumes government potency and private person vulnerability"). *See also* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 16 (suggesting that Chapter 11 might lead to the "entirely perverse result" of requiring governments to pay for the privilege of regulating pollution); Dhooge, *supra* note 48, at 279 (asserting that Chapter 11 gives foreign investors an "undue advantage over host governments with respect to issues of economic regulation").

140. *See* Clarkson, *supra* note 2, at 378 (stating that Chapter 11 gives "corporations the power to overturn the legislative outcomes of national policy debates on the desirable regime to secure the health and safety of the citizenry").

solely on the presence of textual indeterminacy. As noted above, textually indeterminate legal regimes may still achieve legitimacy by creating interpretive processes to infuse ambiguous text with clear meaning. Under these circumstances, the Author and others have counseled readers to examine the jurisprudence of Chapter 11 tribunals before drawing ultimate conclusions about the legitimacy of NAFTA's investment regime.[141]

B. *Legitimacy and Tribunals: Remedy or Complication?*

Turning to the decisions of Chapter 11 tribunals, one finds as of this writing that most have discharged their task of enunciating determinate rules, thus promoting the legitimacy of NAFTA's investment chapter.[142] For example, tribunals have reached virtual unanimity on the proposition that, in the absence of prejudice, non-compliance with Chapter 11's procedural "conditions precedent" results in a curable obstacle to the admissibility of claims, as opposed to a drastically preclusive defect in the jurisdiction of tribunals.[143] Likewise, as of this writing, every tribunal that has addressed the question has concluded that Chapter 11 embraces all measures "relating to" investors and investments, even if those measures are "primarily directed at" trade in goods or services.[144] In the cases that have raised the issue, tribunals also have decided that the phrase "tantamount to expropriation" does not create a *lex specialis* for the

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141. *See* Brower, *supra* note 10, at 45; Soloway & Broadhurst, *supra* note 2, at 390, 403; Beauvais, *supra* note 2, at 266; Loritz, *supra* note 47, at 549. *See also* Price, *supra* note 117, at 113 ("These are sensible arbitrators. If the United States is right and the investor is wrong, it is likely that the tribunal will so find."); Daniel M. Price, *Some Observations on Chapter 11 of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 424 (2000) ("There is no reason to expect . . . that arbitration tribunals will be receptive to attempts to turn [Chapter 11] into a weapon to attack *bona fide* regulatory behavior.").

142. *See* Beauvais, *supra* note 2, at 278 ("Despite the small number of claims decided on the merits, some emerging jurisprudential trends can be detected in the decisions. . . ."). *But see* Dodge, *supra* note 67, at 918 (asserting that "Chapter 11 tribunals have reached different interpretations" on "numerous questions").

143. *See* Pope & Talbot, Inc. v. Canada, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee" (Aug. 7, 2000), para. 26, *available at* http://www.appletonlaw.com/4b3P&T.htm; Pope & Talbot, Inc. v. Canada, Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of the Claim from the Record (the "Harmac Motion") (Feb. 24, 2000), paras. 12-13, 16, *available at* http://www.appletonlaw.com/4b3P&T.htm; *Ethyl Corp.*, Award on Jurisdiction, *supra* note 65, paras. 90-91. *But see Waste Mgmt.*, Award, *supra* note 52 (dismissing a claim for lack of jurisdiction because the investor failed to satisfy the conditions precedent).

144. *S.D. Myers*, Partial Award, *supra* note 40, paras. 294-95; *id.* paras. 61-62 (separate opinion of Bryan Schwartz); *Pope & Talbot*, Award in Relation to the Preliminary Motion by the Government of Canada, *supra* note 65, paras. 33-34; *Ethyl Corp.*, Award on Jurisdiction, *supra* note 65, paras. 63-64. *See also* Afilalo, supra note 2, at 5, 8, 19-20; Brower, *supra* note 10, at 55-56.

North American region but merely incorporates customary international law on creeping expropriation.[145] Furthermore, while Chapter 11 tribunals have not produced a complete definition of the term "like circumstances" for purposes of national treatment, they have given the NAFTA Parties considerable latitude to discriminate among investors and investments based on rational policy considerations.[146] Finally, while they may not have resolved all questions about the relationship between investment disciplines and public regulation, tribunals have found that NAFTA's environmental provisions supply a key part of the interpretive context for Chapter 11,[147] recognized the "high measure of deference that international law generally extends to . . . domestic authorities to regulate matters within their . . . borders,"[148] and agreed that regulations typically fall short of the deprivation required to sustain claims for expropriation.[149] Thus, as predicted by some and confirmed by others, most Chapter 11 tribunals have developed clear rules that strike a healthy balance between the interests of foreign investors with the regulatory obligations of host states.[150] In so doing, they have used "process determinacy" to resolve the problem of textual indeterminacy in NAFTA's investment chapter.[151]

Despite their generally high level of success in promoting determinacy, the NAFTA Parties, their courts, and many observers seem to regard Chapter 11 tribunals as institutions of questionable legitimacy. As explained below, one may attribute such views largely

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145. *See S.D. Myers*, Partial Award, *supra* note 40, paras. 285-86; *Pope & Talbot*, Interim Award, *supra* note 51, para. 104. *See also* Brower, *supra* note 10, at 67-68; Beauvais, *supra* note 2, at 278, 285; Mann & von Moltke, *manuscript*, *supra* note 3, at 16.

146. *See Pope & Talbot*, Award on the Merits of Phase 2, *supra* note 51, paras. 78-79 (indicating that differences in treatment do not violate the principle of national treatment if they have a "reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA"); *S.D. Myers*, Partial Award, *supra* note 40, para. 250 (concluding that the "assessment of 'like circumstances' must take into account circumstances that would justify governmental regulations that treat [nationals and aliens] differently in order to protect the public interest"). *See also* Brower, *supra* note 10, at 72-75; Gantz, *supra* note 40, at 711; Mann & von Moltke, *manuscript*, *supra* note 3, at 11.

147. *See S.D. Myers*, Partial Award, *supra* note 40, paras. 285-86. *See also* Brower, *supra* note 10, at 74; Gantz, *supra* note 40, at 682; Tollefson, *supra* note 17, at 153 n.62; Weiler, *supra* note 17, at 182-83.

148. *See S.D. Myers*, Partial Award, *supra* note 40, para. 263. *See also* Brower, *supra* note 10, at 78-85.

149. *See S.D. Myers*, Partial Award, *supra* note 40, paras. 281-82; *Pope & Talbot*, Interim Award, *supra* note 51, para. 99; Brower, *Empire Strikes Back*, *supra* note 2, at 80-81; Brower, *supra* note 10, at 69-71.

150. *See* Brower, *supra* note 10, at 52, 66-85; Brower & Steven, *supra* note 40, at 201; Weiler, *supra* note 17, at 173-74, 188; Soloway & Broadhurst, *supra* note 2, at 403.

151. *See* FRANCK, *supra* note 71, at 80 (drawing a distinction between "textual determinacy" and "process determinacy").

to the investment chapter's structure, which provides for ad hoc tribunals based on the model of commercial arbitration and, thereby, raises problems of coherence, pedigree, ritual, and adherence to the fundamental values of the governed community.

To depoliticize investment disputes,[152] and to level the playing field between foreign investors and host states,[153] Chapter 11 commits investment disputes to the process of international commercial arbitration[154] under the Additional Facility Rules or the UNCITRAL Rules.[155] These rules provide for the appointment of three-member tribunals ad hoc, and the Author is reliably informed that most arbitrators expect to receive only a single appointment to serve in Chapter 11 disputes.[156] In addition, the rules contemplate greater confidentiality in proceedings[157] and less systematic reporting of decisions than might be expected in litigation before municipal tribunals. Finally, Article 1136 supplements the rules by providing that the awards of tribunals "shall have no binding force except between the disputing parties and in respect of the particular case."[158] While this structure may predominate in routine commercial arbitration and may promote the interpretive flexibility of Chapter 11 tribunals,[159] it generates notable concerns when applied to a high volume of investor-state arbitration under a single governing instrument between nations that have mature regulatory systems and high volumes of cross-border investment.

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152. *See* Brower, *Empire Strikes Back*, *supra* note 2, at 73; Brower & Steven, *supra* note 40, at 195; Clarkson, *supra* note 2, at 377; Price, *supra* note 117, at 112. *See also* William W. Park, *Arbitration and the FISC: NAFTA's "Tax Veto,"* 2 CHI. J. INT'L L. 231, 231 (2001) ("NAFTA gives foreign investors a right to settle investment disputes by arbitration, a process more politically and procedurally neutral than either host state courts or foreign gunboats.").

153. *See* Brower, *Empire Strikes Back*, *supra* note 2, at 73; Brower & Steven, *supra* note 40, at 196. *See also* Avramovich, *supra* note 40, at 1254 (identifying the maintenance of "judicial equality" as a "major task in the settlement of investment disputes").

154. *See* Brower, *Beware the Jabberwock*, *supra* note 2, at 471-76; Brower, *Empire Strikes Back*, *supra* note 2, at 69-74. *See also* Clarkson, *supra* note 2, at 377 (recognizing that Chapter 11 "has imported an . . . arbitration mechanism designed to handle international intercorporate disputes").

155. *See supra* notes 21-25 and accompanying text. As noted above, Chapter 11 also contemplates arbitration under the ICSID Convention, but this option currently does not exist because Canada and Mexico are not states parties to that convention. *See supra* note 24.

156. It should be noted, however, that the Honorable Benjamin Civiletti has sat in three arbitrations. The two completed arbitrations are: *Metalclad*, Award, *supra* note 54, para. 70, and *Azinian*, Award, *supra* note 51. Civiletti also sits in the resubmitted case of Waste Mgmt., Inc. v. Mexico. *See* ICSID, List of Pending Cases (No. 17), *available at* http://www.worldbank.org/icsid/cases/pending.htm.

157. *See infra* notes 191-202 and accompanying text.

158. *See* NAFTA, *supra* note 1, art. 1136(1).

159. Brower, *supra* note 62, at 9.

Although the awards of Chapter 11 tribunals have reached a high level of coherence on many issues,[160] incongruity has become the hallmark of decisions involving the minimum standard of treatment set forth in Article 1105(1).[161] As noted above, that provision requires the NAFTA Parties to treat each others' investors "in accordance with international law, including fair and equitable treatment."[162] By establishing a somewhat creative, rather than a purely analytical, charge for ad hoc tribunals,[163] the last five words seem to invite—perhaps even require—decisions that may raise concerns about legitimacy. To begin with, creative lawmaking by unrepresentative tribunals seems undemocratic and almost certain to yield unpedigreed outcomes.[164] Perhaps more importantly, however, the uncoordinated commitment of creative lawmaking to a series of ad

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160. *See supra* notes 142-51 and accompanying text.

161. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, para. 25 & n.8. *See also* Brower, *Empire Strikes Back*, *supra* note 2, at 55-56; Brower, *supra* note 62, at 10.

162. *See* NAFTA, *supra* note 1, art. 1105(1).

163. Brower, *supra* note 62, at 11. *See also* Gantz, *supra* note 40, at 746 (describing Article 1105 as "the most subjective of the relevant bases for liability under Chapter 11").

As stated elsewhere, the reference to "fair and equitable treatment" in Article 1105(1) represents the exemplification of an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in particular disputes. *See* Brower, *Empire Strikes Back*, *supra* note 2, at 56. *See also* J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (3d ed. 1998) ("When an arbitrator is asked by the parties to have regard to equitable considerations . . . he . . . begins to assume the role of a legislator, creating law for the case in hand."); U.N. CTR. ON TRANSNATIONAL CORPS., BILATERAL INVESTMENT TREATIES 41 (1988) ("It is in the nature of a very general concept like fair and equitable treatment that there can be no precise definition. What is fair and what is equitable may largely be a matter of interpretation in each individual case."); KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES 76 (1992) ("The phrase is vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the disputes provisions."); Ian Brownlie, *Legal Status of Natural Resources in International Law*, 162 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 253, 287 (1979) ("The point is a simple one: with little or no clear content a direction to apply equitable principles is a conferment of a general discretionary power upon the decision-making body."); Stephen Vascianne, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 1999 BRIT. Y.B. INT'L L. 99, 142 ("In practice, . . . this approach may also mean giving considerable discretion to the tribunal entrusted with determining whether a breach of the [fair and equitable] standard has occurred, bearing in mind the subjectivity inherent in the notions of fairness and equity.").

164. *See* Kelly, *supra* note 79, at 529 (observing that creative lawmaking can diminish respect both for adjudicators and for "the entire system of international law"). *See also* José E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 15 (2001) (discussing the "risks posed . . . when international lawyers permit multilateral dispute settlers to get ahead of political consensus").

hoc tribunals creates a considerable likelihood of incoherent results.[165]

To illustrate the potential for mischief, one may examine the melange of views surrounding Article 1105(1). As of this writing, two tribunals have either linked the concept of "fair and equitable treatment" to principles of international law or have interpreted it to prohibit measures deemed arbitrary or unjust from an international perspective, such as violations of independent treaty obligations designed to protect investments.[166] A third tribunal took a more open-ended view, holding that Article 1105(1) prohibits all measures judged to be unfair or inequitable without regard to international law.[167] For its part, the Supreme Court of British Columbia adopted the view that Article 1105(1) only prohibits measures forbidden by customary international law.[168] NAFTA Parties, on the other hand, have adopted the narrow view that Article 1105(1) prohibits only those delicts recognized to violate customary international law in the 1920s—namely, egregious, outrageous, or shocking government conduct.[169]

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165. *See* Gantz, *supra* note 40, at 658 (noting the lack of "any assurance that the *ad hoc* arbitral decisions . . . emerging under Chapter 11 will be consistent"); Schneider, *supra* note 73, at 757 (explaining that "*ad hoc* . . . arbitration panels . . . have the potential for creating confusion for investors, thus diminishing [the] predictability" of investor-state arbitration); Mann & von Moltke, *manuscript*, *supra* note 3, at 21 (lamenting the tendency of *ad hoc* procedures to deprive Chapter 11 of the "institutional capacity to manage the dispute settlement process"). *See also* Afilalo, *supra* note 2, at 43 (expressing concern about the lack of permanent judicial or political institutions to manage the Chapter 11 process); Beauvais, *supra* note 2, at 263 (observing that the absence of binding precedent or appellate procedures increase the possibility of inconsistent decisions, which correspondingly decrease the likelihood of predictable operation).

166. *See S.D. Myers*, Partial Award, *supra* note 40, paras. 262-64; *Metalclad*, Award, *supra* note 54, para. 74. *See also* Brower, *supra* note 10, at 80-81, 83; Weiler, *supra* note 17, at 184; Weiler, *supra* note 3, at 420-21.

167. *See Pope & Talbot*, Award on the Merits of Phase 2, *supra* note 51, at paras. 110-18. *See also* F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B. INT'L L. 241, 243-44.

Despite the apparent breadth of the rule enunciated in its award, the *Pope & Talbot* tribunal applied it in a conservative manner, declined "to substitute its judgment . . . for Canada's," and denied almost all challenges to Canadian export regulations because they represented a "reasonable response to the circumstances." *See Pope & Talbot*, Award on the Merits of Phase 2, *supra* note 51, at paras. 121, 123, 125, 128, 155, 185. *See also* Brower, *Empire Strikes Back*, *supra* note 2, at 55 n.69; Weiler, *supra* note 3, at 415.

168. *See Metalclad*, Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 58, paras. 62-65. *See also* Gantz, *supra* note 40, at 678.

169. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 46 & n.36, 57 & n.40; *S.D. Myers*, Canada's Memorandum of Fact and Law, *supra* note 59, para. 198. *See also* Weiler, *supra* note 3, at 426 ("Before each tribunal, lawyers for the NAFTA parties have unsuccessfully argued that . . . art. 1105[ ] requir[es] no more than a bare minimum of protection for foreign investments against egregious, shocking or outrageous government conduct.").

Although doctrinal incoherence could prove troublesome under any circumstances, the situation has become particularly acute following Article 1105(1)'s emergence as the "alpha and omega" of Chapter 11 disputes.[170] As of this writing, every award rendered against a NAFTA Party rests at least in part on the denial of "fair and equitable treatment."[171] Similarly, every pending claim alleges a violation of Article 1105.[172] These disputes place over $2 billion in controversy, and their outcome will influence both future deployments of capital and the regulatory practices of host states.[173] Given these high stakes, the inability of ad hoc tribunals to establish a uniform understanding of Article 1105(1) deals a serious blow to coherence and predictability, the necessary foundation of legitimacy for NAFTA's investment chapter. Referring to a similar conflict between two non-NAFTA awards, one observer remarked that the situation "brings the law into disrepute, it brings arbitration into disrepute—the whole thing is highly regrettable."[174]

Ad hoc tribunals based on the commercial arbitration model also create legitimacy concerns due to their perceived failure to conform to historical practice and to incorporate fundamental values of the governed community. Although its drafters clearly intended Chapter 11 to benefit from the dignified pedigrees of international commercial arbitration and the BIT framework,[175] key segments of the governed community have rejected the validity of these pedigrees due to the perceived unsuitability of those historical models for Chapter 11 disputes.[176] For example, observers of Chapter 11 routinely argue that the model of "private," "commercial" arbitration is not suitable for conducting the public's business.[177] For similar reasons, nongovernmental organizations (NGOs) and the NAFTA Parties routinely cite the public or regulatory character of Chapter 11

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170. *See* Brower, *supra* note 62, at 9.

171. *See id.*

172. *See id.*

173. *See id.*

174. *See Loewen Group*, U.S. Response to Article 1128 Submissions, *supra* note 62, at 4 (quoting M. Rushton, *Clifford Chance Entangled in Bitter Lauder Arbitrations*, LEGAL BUS., Oct. 2001, at 108 (quoting Clifford-Chance partner Jeremy Carver)). *See also* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 19 (warning that "the investor-state arbitration process established by Chapter 11 has an anarchic aspect that reduces the predictability of any arbitration proceeding").

175. *See* Brower, *Beware the Jabberwock*, *supra* note 2, at 471-76; Brower, *Empire Strikes Back*, *supra* note 2, at 69-74.

176. As explained above, perceived dissonance between historical models and reality render pedigrees incapable of conferring symbolic validity. *See supra* notes 93-97 and accompanying text.

177. *See, e.g.*, MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 6, 14; PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 37, 39; Cremades & Cairns, *supra* note 3, at 183, 184-85, 192-93, 195-96, 208-09; Dhooge, *supra* note 48, at 278-79; Fracassi, *supra* note 66, at 220-21; Soloway, *Challenge of Private Party Participation*, *supra* note 3, at 11; Tollefson, *supra* note 17, at 162; Beauvais, *supra* note 2, at 262.

disputes to justify derogation from practices long accepted as key features of international commercial arbitration.[178]

Likewise, while the BIT network theoretically establishes a precedent for resolving investment disputes through commercial arbitration,[179] observers might reject its validity based on a key difference between most BITs and Chapter 11. Most BITs govern the relations between investors from developed states and their developing host states,[180] which generally lack mature regulatory systems and high volumes of cross-border investment. Under these circumstances, investment disputes may not be frequent and may not interfere with the core activities of host governments.[181] By contrast, Chapter 11 governs relations between foreign investors and host states with mature regulatory systems and high volumes of cross-

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178. For example, when seeking authorization for third-party participation in the proceedings, the NAFTA Parties and NGOs have encouraged tribunals to disregard the practices of international commercial arbitration and to adopt an approach more suited to disputes involving matters of public interest. United Parcel Serv. of Am. v. Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001), paras. 21, 23-24, 34, *available at* http://www.naftaclaims.com [hereinafter *United Parcel,* Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae]; Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (Jan. 15, 2001), paras. 5, 8, 17, *available at* http://www.naftaclaims.com [hereinafter *Methanex,* Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae"]

Similarly, when discussing the level of judicial scrutiny appropriate for tribunal awards, the NAFTA Parties and many critics argue that courts should disregard the deferential approach of commercial arbitration and, instead, adopt a level of supervision more suited to the public character of Chapter 11 disputes. *See S.D. Myers*, Canada's Memorandum of Fact and Law, supra note 59, paras. 119-20, 140-41; *S.D. Myers*, Mexico's Memorandum of Fact and Law, *supra* note 59, paras 53-61. *See also infra* notes 186, 211 and accompanying text; Tollefson, *supra* note 24, at 203-04, 221-22.

179. *See* Paterson, *supra* note 3, at 118. *See also* Brower & Steven, *supra* note 40, at 193 (describing Chapter 11 as "but another example of an evolving consensus regarding international investment regulation"); Cremades & Cairns, *supra* note 3, at 176 (describing the proliferation of BITs and concluding that investor-state arbitration has become "an established . . . feature of modern international commercial arbitration"); Sandrino, *supra* note 117, at 324 (recognizing that "the combination of the BIT movement and the investment provisions in NAFTA may be seen as part of an ongoing process to create a new international framework for the regulation of foreign direct investment").

180. *See* Brower & Steven, *supra* note 40, at 194-95; Price, *supra* note 117, at 113; Weiler, *supra* note 3, at 406.

181. The governments of developed states virtually never had to respond to investment disputes under BITs because the capital flows subject to them ran almost exclusively from developed states to developing states, not vice versa. *See* Brower & Steven, *supra* note 40, at 194-95; Weiler, *supra* note 3, at 406. *But see* José Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L.J. 255, 258, 270-71 (1994) (observing theoretically that BITs "may be signed between states of similar development," that capital importing states may become capital exporting states, and that BITs create a situation of legal parity between states parties).

border investment. In this situation, investment disputes will arise more often,[182] and are more likely to intrude on the core activities of host governments.[183] These facts arguably support descriptions of Chapter 11 as a "new type of commercial arbitration" that "differs fundamentally from traditional international commercial arbitration."[184] To its most ardent critics, Chapter 11 thus embodies a new and revolutionary regime that "acutely craves," but can never obtain, "authentication by ancient anachronisms."[185]

Even if international commercial arbitration and the BIT framework supplied a valid pedigree for Chapter 11 disputes, perceptions of legitimacy would still depend on views about tribunals' adherence to the rituals established by those systems and incorporated into Chapter 11. In this respect, the nature of ad hoc tribunals raises additional concerns: the short terms of service and the absence of a serious and permanent secretariat impair the development of the levels of expertise that characterize standing tribunals.[186] Under these circumstances, the governed community may fear that inexperienced tribunals will be prone to deviate from the prescribed rituals so seriously as to change the nature of the arbitral process. While the Author finds such views uncompelling, the NAFTA Parties apparently do not.[187] In any event, the point is

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182. *See* Brower & Steven, *supra* note 40, at 195 (asserting that the high level of cross-border investment between Canada and the United States made "inevitable" the possibility that the two governments would have to defend themselves before Chapter 11 tribunals).

183. *See* Banks, *supra* note 50, at 504 (arguing that "it is difficult to separate the regulations impugned by [Chapter 11] claims from types of regulations that form longstanding parts of the legal and social landscape in North America"); William T. Warren, *Paying to Regulate: A Guide to* Methanex v. United States *and NAFTA Investor Rights*, 31 ENVTL. L. REP. 10986 (2001) (stating that the Chapter 11 claims brought against the United States "challenge core . . . government functions"). *See also* William S. Dodge, *International Decision*, 95 AM. J. INT'L L. 186, 191 (2001) (observing that Chapter 11's negotiators assumed—incorrectly—that investment disputes would arise infrequently and would not challenge important national policies).

184. Cremades & Cairns, *supra* note 3, at 183.

185. FRANCK, *supra* note 71, at 109. *See also* Stephan, *supra* note 79, at 797-98 (explaining that "[a]ll legal claims use a vocabulary that implies ancient usage, no matter how innovative the underlying effort").

186. *See S.D. Myers*, Canada's Memorandum of Fact and Law, *supra* note 59, paras. 135, 137 (arguing that Chapter 11 tribunals "should not attract extensive judicial deference" because such *ad hoc* bodies "are not standing tribunals with established or recognized expertise" and their members "are not necessarily chosen for their knowledge of trade law"). *See also infra* note 211 and accompanying text.

187. In recent annulment proceedings, Canada and Mexico seem to have advanced this view by emphasizing the tribunals' lack of expertise and their purported failure to apply the governing law, thus resulting in a usurpation of jurisdiction. *See S.D. Myers*, Canada's Memorandum of Fact and Law, *supra* note 59, paras. 6, 63, 117-18, 135, 137, 152-221; *S.D. Myers*, Mexico's Memorandum of Fact and Law, *supra* note 59, paras. 29, 47, 49-50, 82-88, 129-63. *See also supra* note 186 and *infra* notes 211, 250-51 and accompanying text; Tollefson, *supra* note 24, at 212.

that if important segments of the governed community come to perceive ad hoc tribunals as too inexperienced to follow complicated rules and procedures, those tribunals will not enjoy legitimacy.

If the governed community does not see Chapter 11 tribunals as conforming to historical practice, adherence to fundamental values, such as accountability, transparency, and democratic participation, becomes an element essential to the perceived legitimacy of investor-state arbitration.[188] In this respect, the use of ad hoc tribunals generates further concerns. Brief periods of service and low expectations of future service decrease the perceived accountability of tribunal members.[189] Brief periods of service may also enable tribunal members to resist calls for greater transparency and democratic participation.[190] The remaining features of Chapter 11 do little to promote transparency or participation because they give the public no right to receive copies of pleadings, evidence, or written arguments, much less to take part in the proceedings.[191] The Additional Facility and UNCITRAL Arbitration Rules further undermine transparency and participation by requiring closed hearings in the absence of party consent.[192] Under these

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188. *See supra* notes 108-11 and accompanying text (describing conformity to historical practice and incorporation of fundamental values as necessary alternatives).

189. *See* Cremades & Cairns, *supra* note 3, at 195 (mentioning "arbitration's lack of democratic accountability"); Peterson, *supra* note 117 (describing Chapter 11 tribunals as "secretive and unaccountable"); Mann & von Moltke, *manuscript*, *supra* note 3, at 21 (describing the level of arbitrators' accountability as "severely attenuated").

190. *See* Beauvais, *supra* note 2, at 263 (complaining that the work of Chapter 11 tribunals "is largely insulated from public scrutiny or public participation"). *See also* Mann & von Moltke, *manuscript*, *supra* note 3, at 22 (discussing the "highly significant" absence of "institutions that might promote a sense of collective responsibility" among the members of Chapter 11 tribunals).

191. Chapter 11 specifically grants non-disputing NAFTA Parties the right of access to all pleadings, evidence, and written arguments submitted during the course of the proceedings, as well as the right to make submissions on questions regarding the interpretation of NAFTA. *See* NAFTA, *supra* note 1, arts. 1127, 1128, 1129. The negative implication is that no one else enjoys those rights of access and participation. *See United Parcel,* Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, *supra* note 178, paras. 61-62, 70, 73 ("Under Chapter 11 and the UNCITRAL Rules provision is made for the communication of pleadings, documents and evidence to the other disputing party, the other NAFTA Parties, the Tribunal and the Secretariat—and to no one else."). *See also* Clarkson, *supra* note 2, at 381 ("Transparency is the first victim in this secret world of commercial arbitration. Proceedings are held in camera. The briefs that document the parties' pleadings and even the existence of a case may be kept secret, if the parties so wish."); Gantz, *supra* note 40, at 659 ("[G]iven the lack of transparency of the arbitral process under NAFTA, some of the essential facts and arguments of the parties may not be publicly available.").

192. *See* Arbitration (Additional Facility) Rules, art. 39(1), (2), *available at* http://www.worldbank.org/icsid/facility/47.htm; UNCITRAL Arbitration Rules, art. 25(4), *available at* http://www.uncitral.org/en-index.htm; Wagner, *supra* note 47, at 476. *See also* Clarkson, *supra* note 2, at 384 ("Exclusion of citizens from [Chapter 11

circumstances, a broad coalition of forces has called for "greater public participation and transparency in the arbitral process,"[193] which some now describe as a form of "secret government."[194]

In an effort to burnish the image of NAFTA's investment chapter, two tribunals concluded in principle that they possess the authority to accept *amicus curiae* briefs.[195] While this may represent a welcome development,[196] one should not overestimate the resulting benefits to transparency and democratic participation. First, because the tribunals did not give potential *amici* the right to receive pleadings or to attend hearings,[197] the decisions contribute little to the promotion of transparency. Second, because potential *amici* have no right to obtain pleadings and because the recent decisions only contemplate the receipt of helpful submissions,[198] one wonders (1)

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proceedings] is a further de-legitimizing feature."). In an earlier time, people may have regarded this lack of transparency and participation as a positive feature that promoted the depoliticization of investment disputes. *See* Ian Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 225 (2001).

193. Tollefson, *supra* note 24, at 185. *See also* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 49; PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 11, 20; Dhooge, *supra* note 48, at 278-79; Fracassi, *supra* note 66, at 221-22; Tollefson, *supra* note 17, at 163; Beauvais, *supra* note 2, at 293; Mann & von Moltke, *manuscript*, *supra* note 3, at 19-20.

194. *See* Anthony DePalma, *NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, § 3, at 1 (quoting the president of Public Citizen); Ferguson, *supra* note 40, at 515 (quoting the statement of a World Wildlife Fund official to the effect that Chapter 11 "is being used to rewrite important public policies behind closed doors"). *See also* Clarkson, *supra* note 2, at 377 (describing Chapter 11 disputes as a "zone of largely secretive adjudication"); Cremades & Cairns, *supra* note 3, at 195, 197 (discussing the allegations of "excessive secrecy" and predicting an increase in complaints about "secret and anonymous tribunals," as well as "fears of the erosion of democracy and sovereignty").

195. *See United Parcel,* Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, *supra* note 178, paras. 61-62, 70, 73; *Methanex*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," *supra* note 178, at paras. 31, 39, 47, 49, 53. *See also* Cremades & Cairns, *supra* note 3, at 198-99; Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 241-42 (2002); Tollefson, *supra* note 24, at 204; Tollefson, *supra* note 17, at 164; Beauvais, *supra* note 2, at 293.

196. Acceptance of *amicus* submissions at least deprives critics of the opportunity to lambaste tribunals for undue secrecy. *See Methanex*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," *supra* note 178, para. 49.

197. *See United Parcel,* Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, *supra* note 178, paras. 67-69; *Methanex*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," *supra* note 178, paras. 41-42, 46-47. *See also* Cremades & Cairns, *supra* note 3, at 199; Tollefson, *supra* note 17, at 164.

198. *See United Parcel,* Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, *supra* note 178, paras. 61, 70; *Methanex*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," *supra* note 178, para. 48.

whether potential *amici* can formulate informed submissions,[199] (2) whether tribunals will accept uninformed submissions, and (3) whether the recent decisions really advance the cause of meaningful participation. Third, assuming that tribunals will accept *amicus* submissions from NGOs, this may not promote *democratic* participation because many NGOs have very specific agendas and are not accountable to their own members,[200] much less to the general public.[201] Thus, despite their best efforts, Chapter 11's ad hoc tribunals may seem illegitimate because they do not serve the fundamental values of accountability, transparency, and democratic participation.[202]

To summarize, arbitral tribunals promote legitimacy by supplying a process for resolving the textual indeterminacy of NAFTA's investment chapter. On the other hand, the use of ad hoc tribunals based on the format for commercial arbitration may seem illegitimate because they have rendered incoherent decisions on a crucial issue, lack a pedigree accepted as valid by important segments of the governed community, seem incrementally more prone to deviate from rituals, and fail to incorporate certain fundamental values of the governed community. Although one rightly may attribute these infelicities to the structure of Chapter 11 rather than to the personal shortcomings of tribunal members, they raise concerns about legitimacy, which, if not resolved, might herald the demise of NAFTA's investment chapter.

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199. *See* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 56 (expressing concern that NGOs may lack "sufficient accurate information . . . to make . . . submissions in an informed manner").

200. *See* McGinnis & Movsesian, *supra* note 102, at 571.

201. *See* Atik, *supra* note 103, at 458-59. *See also* Cremades & Cairns, *supra* note 3, at 178-79 (defining NGOs as organizations "devoted to specific issues . . . or to representing particular interests"). In some circles, NGOs have the reputation of "meddling groups" that "seek to impose their views" on others. *See* Daniel D. Bradlow, *"The Times They Are A-Changing:" Some Preliminary Thoughts on Developing Countries, NGOs and the Reform of the WTO*, 33 GEO. WASH. INT'L L. REV. 503, 504 (2001).

202. *See* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 7, 60 (explaining that "the absence of transparency leads to a significant loss of democratic legitimacy" and predicting that the "secretive process" would, "like a cancer, . . . erode the democratic legitimacy of the entire international . . . investment regime"); Afilalo, *supra* note 2, at 42, 52 (stating that *ad hoc* arbitration panels lack the "legitimacy," "transparency," and "accountability" of national courts); Cremades & Cairns, *supra* note 3, at 196, 208-09 (describing the "lack of democratic credibility or public accountability" as the "Achilles heel" of international arbitration, and calling for reform of the arbitral process); Beauvais, *supra* note 2, at 255-56 (referring to Chapter 11 tribunals as "unaccountable" and "non-transparent"). *See also* PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 37, 44 (referring to the "absence of democratic safeguards" in investor-state arbitration under Chapter 11, which "excludes guarantees of public participation and in which secrecy is the guiding principle").

C. *Legitimacy and the NAFTA Parties: Antidote or Toxin?*

Chapter 11's drafters gave the NAFTA Parties two mechanisms to remedy the legitimacy concerns raised by ad hoc tribunals. First, Article 1136(3) permits losing NAFTA Parties to seek revision or annulment—but not appeal—of awards by municipal courts at the seat of arbitration.[203] While this limited form of judicial control does not provide an opportunity to cure doctrinal incoherence, supply pedigrees, or promote the incorporation of fundamental values, it does allow courts to review the arbitral proceedings for gross procedural defects;[204] in other words, it promotes adherence to ritual. Second, Article 1131(2) authorizes the Free Trade Commission—the trade ministers of the three NAFTA Parties acting in concert—to issue binding interpretations of NAFTA provisions, which then become part of the governing law in Chapter 11 disputes.[205] This tool offers a potential cure for doctrinal incoherence,[206] may enhance the

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203. *See* NAFTA, *supra* note 1, art. 1136(3). In international practice, "revision" differs from appeal in that it requires discovery of "decisive" new facts that were unknown to the tribunal and the party seeking revision. J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION 242 (1959). Also, revision does not permit the reweighing of facts or law. *Id.*

In modern international practice, courts may use "annulment" to rectify gross procedural injustices (such as excess of jurisdiction or denial of the right of audience), but not mistakes of law. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 708-09 (2d ed. 2001); JOHN COLLIER & VAUGHN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW 257-59 (1999); W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 502-03 (3d ed. 2000); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 434 (3d ed. 1999). *See also* Park, *supra* note 152, at 235 ("Courts should exercise . . . control . . . over the arbitration's basic procedural integrity (looking at matters such as bias, excess of authority and due process), but should not second guess the arbitrator on the substantive merits of the dispute.").

In the past, some observers identified "essential error" as a ground for annulment. *See* SIMPSON & FOX, *supra*, at 250, 256. *But see* JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 98 (1929) (expressing the view that "no authority" believes that an award "may be attacked because of erroneous appreciation either of the facts or of the law applicable to them"). One may attribute this practice to the need for judicial control over arbitrators who, at that time, often had no legal training. *See* REDFERN & HUNTER, *supra*, at 436 n.13. Even this practice did not, however, permit annulment based on routine errors of fact or law. *See* SIMPSON & FOX, *supra*, at 256-57.

By contrast, an "appeal" suggests the opportunity to reexamine "any aspect of a decision with full opportunity accorded to the parties to argue." W. MICHAEL REISMAN, NULLITY AND REVISION 212 (1971).

204. *See supra* note 203.

205. *See* NAFTA, *supra* note 1, art. 1131(2).

206. *See* U.S. Post-Hearing Submission (*ADF*), *supra* note 62, at 10. *See also* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 47 (describing interpretive statements as the only short-term solution to "the uncertainties created by the language in Chapter 11"); Dodge, *supra* note 67, at 191 (urging the NAFTA Parties to use interpretive statements to resolve doctrinal incoherence, "thus providing guidance and predictability for future cases").

pedigree of the rules as interpreted,[207] and may promote the incorporation of fundamental values by introducing a measure—albeit an indirect measure—of democratic accountability and participation into the Chapter 11 process.[208] In short, annulment proceedings and binding interpretations hold the promise of elixirs that theoretically could alleviate the legitimacy crisis in NAFTA's investment chapter. Ironically, however, their use to date has prompted claimants, tribunals, and observers to accuse the NAFTA Parties of making illegitimate attempts to subvert the Chapter 11 process.

Although Chapter 11 employs annulment proceedings to enhance the legitimacy of the arbitral process, that strategy will succeed only if the NAFTA Parties and their courts strictly observe the ritual of limited review.[209] While any deviation from that ritual would undermine the legitimacy of annulment proceedings, the blow would be particularly severe if motivated by a desire to gratify the short-term self-interest of the NAFTA Parties.[210] Given these qualifications, the drawbacks of judicial control of Chapter 11 awards by municipal courts of the NAFTA Parties seem obvious. In both of the annulment proceedings now completed or underway, the government of the judicial forum—Canada—has appeared as an interested party, has essentially described Chapter 11 tribunals as illegitimate institutions, and has requested a level of judicial scrutiny not compatible with the letter or the spirit of NAFTA's investment chapter. In Canada's trenchant words to its own courts,

> [t]he NAFTA architecture indicates that the awards of Chapter 11 tribunals about public measures are not supposed to be worthy of judicial deference and not supposed to be protected by a high standard of review. Chapter Eleven Tribunals do not exhibit the features of a specialised or expert administrative tribunal. Chapter Eleven Tribunals are currently appointed *ad hoc* and for single cases. There is no Chapter Eleven secretariat or in-house specialists or other institutional hallmark of expertise or special authority. This contrasts with the standing secretariat of the World Trade Organization supporting its dispute settlement panels or the staff supporting permanent domestic administrative tribunals. . . .[211]

Such words reveal the untenable conflict of interest for the government of the judicial forum. As the representative of an interested party, the government's counsel must take all steps to

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207. *See* Franck, *Legitimacy*, *supra* note 70, at 727 (explaining that "a new rule may be taken more seriously if it arrives on the scene under the aegis of a particularly venerable sponsor").

208. *See* Kelly, *supra* note 79, at 527-28 (recognizing that the possibility of legislative revision mitigates the democratic problems of judicial rulemaking).

209. *See* Franck, *Legitimacy*, *supra* note 70, at 735-36.

210. *Id.* at 725.

211. Canada's Outline of Argument (*Metalclad*), *supra* note 58, para. 25.

avoid liability.[212] On the other hand, as a NAFTA Party, the same government has an obligation to perform its treaty obligations in good faith, and to encourage its courts to do the same. Some observers claim that government attorneys must resolve this ethical dilemma by discharging their "responsibility for the integrity of the international legal system."[213] Others, including the NAFTA Parties, assume that government lawyers remain free,[214] or at least more likely,[215] to favor their obligations as hired guns. Yet when they choose that path and urge their own courts to second-guess the merits of Chapter 11 awards, the NAFTA Parties arguably violate their treaty obligations,[216] appear to suborn derogation from ritual, and,

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212. *Cf.* Christopher M. Koa, *The International Bank for Reconstruction and Development and Dispute Resolution: Conciliating and Arbitrating with China Through the International Centre for Settlement of Investment Disputes*, 24 N.Y.U. J. INT'L L. & POL. 439, 471 (1991) (indicating that "[t]he very availability of [ICSID's annulment] procedure . . . virtually requires the professionally ethical counsel to recommend its vigorous exploitation" (quoting W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 787)).

213. Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956, 1970-71 (1989).

214. *See Pope & Talbot*, Ruling Concerning Investor's Motion to Change Place of Arbitration, *supra* note 67, at paras. 11-13 (recounting Canada's contention that it had a procedural right to request annulment proceedings and to seek lower standards of judicial deference from its own courts). *See also* Thomas, *supra* note 2, at 459-60 (quoting an unpublished decision of the tribunal in *Waste Mgmt., Inc. v. Mexico*, which seems to accept the propriety of such conduct).

215. *See* Gantz, *supra* note 50 (claiming that "the practice of challenging adverse decisions (*S.D. Myers* and *Metalclad*) in national courts . . . is understandable, given the tendency of government lawyers, like all attorneys, to resort to all available remedies").

216. As one Chapter 11 tribunal has ruled, the NAFTA Parties are not mere litigants in annulment proceedings, but also parties that have obligations to maintain the integrity of Chapter 11. *Pope & Talbot*, Ruling Concerning Investor's Motion to Change Place of Arbitration, *supra* note 67, para. 18. Furthermore, the positions taken by the NAFTA Parties in litigation before their own courts may be critical in determining whether they have fulfilled their treaty obligations. *See id.* paras. 18-19. *See also United Parcel*, Decision of the Tribunal on the Place of Arbitration, *supra* note 67, paras. 8, 10 (indicating that the tribunal was "troubled" by positions taken by the Canadian Government before its own courts in the *Metalclad* annulment proceedings).

Other international tribunals have expressed similar views and have imposed liability on states for not sufficiently encouraging their own courts to recognize or enforce the results of treaty-based adjudication. *See* LaGrand Case (Gr. v. U.S.), 2001 I.C.J., paras. 112, 115 (June 27), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm (ruling that the United States breached its obligation to take all measures at its disposal to implement the court's order for provisional measures and citing "the Solicitor General's categorical statement . . . to the United States Supreme Court that 'an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief'"); Iran v. United States, Iran-U.S. Cl. Trib. Rep., paras. 66-71 (1998), *available in* 1998 WL 1157733 (holding that judicial second-guessing of a Tribunal award violated the submission to final and binding arbitration and suggesting that the U.S. Government could have

thus, undermine the legitimacy of annulment proceedings.[217]

Turning to the judicial fora themselves, the situation does not improve. Although they may have laudable traditions of independence,[218] the courts of the NAFTA Parties lack experience in international affairs, which, combined with constitutional doctrine, supports a strong policy of judicial deference to their own governments' views on matters of international law.[219] While this policy may be eminently reasonable in most situations, it becomes problematic when applied to annulment proceedings that require or permit the government to appear as an interested party. At the very least, these circumstances encourage the courts of the NAFTA Parties to violate the most fundamental tenet of procedural justice common to international law,[220] Chapter 11,[221] and the pertinent rules of arbitration:[222] equality of treatment of the parties. One may attribute this problem not to the venality of the NAFTA Parties or their courts, but rather to the treaty's provision for judicial control by municipal courts, which unhappily juxtaposes the NAFTA Parties' roles as litigants and as states parties. Yet that does not change the result: a regrettable, systematic predisposition to approach and

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avoided liability by filing a statement of interest explaining to its courts why the tribunal's award deserved enforcement).

217. Extensive judicial review also undermines the legitimacy of investor-state arbitration by impairing the capacity of the process to produce final (that is to say, "determinate") outcomes. *See* Gantz, *supra* note 40, at 685 (predicting that "the extent of the finality and the usefulness of NAFTA tribunal awards . . . will remain an open question until the scope of court review . . . is better defined through experience"). *See also* COLLIER & LOWE, *supra* note 203, at 257 (observing that "the prospect of annulment weakens the utility of an award as a final disposition of the dispute").

218. In the past, observers questioned the independence of Mexican courts. *See* Mann, *supra* note 47, at 402 (noting that Mexican courts were "generally considered corrupt or at least compliant with the will of the state"). *See also* Soloway, *Environmental Trade Barriers Under NAFTA*, *supra* note 3, at 88.

219. *See* FRANCK, *supra* note 71, at 130; Kelly, *supra* note 79, at 506. *See also* Afilalo, *supra* note 2, at 52 (acknowledging that "national courts may tend to favor [the views of] their own governments"); Ganguly, *supra* note 17, at 125 (recognizing that the judiciaries of host states may be "sympathetic to the government's cause").

220. *See* Brower, *Beware the Jabberwock*, *supra* note 2, at 486; Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 87 (2000); John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1179, 1195 (1999).

221. *See* NAFTA, *supra* note 1, art. 1115 (establishing a "mechanism for the settlement of investment disputes that assures . . . equal treatment among investors of the Parties in accordance with the principle of international reciprocity").

222. *See* Pope & Talbot, Inc. v. Canada, Decision and Order by the Tribunal (Mar. 11, 2002), para. 16 n.6, *available at* http://www.appletonlaw.com/4b3P&T.htm; Pope & Talbot Inc. v. Canada, Decision by Tribunal (Sept. 6, 2000), para. 1.5 (NAFTA/UNCITRAL), *available at* http://www.appletonlaw.com/4b3P&T.htm.

conduct judicial proceedings on the basis of self-interest and, therefore, undermine the legitimacy of annulment proceedings.[223]

While the use of binding interpretations holds great theoretical promise for enhancing the legitimacy of investor-state arbitration, the Free Trade Commission mechanism, as applied by the NAFTA Parties to date, lacks certain elements of legitimacy. The want of a pedigree represents the Free Trade Commission's most obvious, but least significant, shortcoming.[224] More important is the Commission's evident promulgation of interpretations that lack textual determinacy. As noted above, the Free Trade Commission purported to adopt the following three interpretations on July 31, 2001:

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment . . . .
>
> 2. The concept[ ] of "fair and equitable treatment" . . . do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment . . . .
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[225]

Unfortunately, these Notes contain significant ambiguities that merely increase the room for debate. For example, the NAFTA Parties construe the Notes to require sitting and future tribunals to decide claims based on the principles that (1) "international law" means "customary international law";[226] (2) "fair and equitable treatment" corresponds to outdated customary rules prohibiting only "egregious," "outrageous," and "shocking" government conduct;[227] and (3) external treaty provisions have absolutely no relevance to the application of Article 1105(1).[228] As the Author has observed

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223. *See* Dodge, *supra* note 67, at 916, 918 (noting that the court's decision in the *Metalclad* annulment proceedings was "not principled" and wondering "whether it is appropriate to allow national courts to review Chapter 11 awards").

224. *See* Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L (forthcoming 2003) (describing the Free Trade Commission's "unique" role as a control mechanism).

225. *See supra* notes 60-61 and accompanying text.

226. *See* U.S. Post-Hearing Submission (*ADF*), *supra* note 62, at 13-16; *S.D. Myers*, Canada's Memorandum of Fact and Law, *supra* note 59, paras. 205-06.

227. *See* U.S. Post-Hearing Submission (*ADF*), *supra* note 62, at 2-4; *S.D. Myers*, Canada's Memorandum of Fact and Law, *supra* note 59, para. 200. *See also supra* note 62 and accompanying text.

228. *See S.D. Myers*, Canada's Memorandum of Fact and Law, *supra* note 59, paras. 205-07; *Methanex*, Canada's Third Article 1128 Submission, *supra* note 63, para. 13; Methanex Corp. v. United States, Rejoinder of Respondent United States to Methanex's Reply Submission Concerning the NAFTA Free Trade Commission's July

elsewhere, however, tribunals might interpret the Notes differently. For instance, they might read the Notes to confirm the view that Article 1105(1) represents a statement of *opinio juris* to the effect that, through widespread incorporation into BITs, the conventional standard of "fair and equitable treatment" has become a rule of customary international law.[229] Likewise, even if the breach of separate treaty obligations does not per se "establish" a violation of Article 1105, tribunals might still characterize treaty violations as relevant, perhaps even strong, evidence of unfair and inequitable treatment.[230] Whatever one's position on the merits of this debate, the point is that the Free Trade Commission so far has not proven adept at formulating determinate—that is legitimate—interpretations. As a result, it has also failed to perform the intended function of eliminating the doctrinal incoherence that gnaws at the legitimacy of Chapter 11 tribunals.

To make matters worse, the NAFTA Parties arguably have violated the single prescribed ritual for the adoption of binding interpretations by the Free Trade Commission. That ritual involves

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31, 2001 Interpretation (Dec. 17, 2001), at 8, *available at* http://www.state.gov/documents/organization/7027.pdf. *See also* S.D. Myers, Inc. v. Canada, Submission of the United States (Sept. 18, 2001), para. 12, *available at* http://www.state.gov/documents/organization/6029.pdf (asserting that Chapter 11 tribunals lack the authority even to "address" violations of other chapters of NAFTA).

229. Brower, *supra* note 62, at 10. Some believe that widespread references to "fair and equitable treatment" in BITs have transformed the conventional rule into a principle of customary international law. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 54, 61-62; Weiler, *supra* note 3, at 417 n.34, 434.

Nevertheless, Chapter 11's drafters might have deemed a statement of *opinio juris* to be necessary because such assertions remain a matter of substantial debate. *See* U.S. Post-Hearing Submission (*ADF*), *supra* note 62, at 20-21 (arguing that the practices memorialized in BITs lack *opinio juris* and, therefore, do not support the development of customary international law); Memorial of the Investor (*ADF*), *supra* note 127, para. 239 (asserting that customary international law does not require "fair and equitable" treatment of investments). *See also* Vascianne, *supra* note 163, at 157, 160, 163-64 (observing that "the presence of the fair and equitable standard in the vast majority of [BITs] could arguably demonstrate that States accept the standard as legally binding" under customary international law, but noting "cogent countervailing arguments" and concluding that "the better view is that the fair and equitable standard has not passed into the corpus of customary law").

230. *See Methanex*, Second Opinion of Professor Sir Robert Jennings, *supra* note 68, at 4; Loewen Group, Inc. v. United States, Joint Reply of Claimants to the November 9, 2001 Article 1128 Submissions of Canada and Mexico (Dec. 7, 2001), at 12, *available at* http://www.state.gov/documents/organization/6919.pdf; Brower, *supra* note 62, at 10. *See also* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 31 (explaining that the minimum standard overlaps with disciplines on national treatment, MFN treatment, and expropriation); Gantz, *supra* note 40, at 747 (stating that discriminatory treatment that violates the obligation of national treatment may also constitute unfair and inequitable treatment); Tollefson, *supra* note 24, at 213 (observing that the Notes do not prohibit tribunals from considering whether conduct that breaches other treaty provisions might also constitute unfair or inequitable treatment for purposes of Article 1105).

the NAFTA Parties' obligation to interpret the NAFTA "in accordance with applicable rules of international law,"[231] which evidently include the customary rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties (Vienna Convention).[232] Thus, the members of the Free Trade Commission must interpret words according to their ordinary meaning taken in context, in light of the treaty's object and purpose, and with reference to all relevant international obligations governing relations among the NAFTA Parties.[233] Yet, some observers believe that the NAFTA Parties must have ignored this ritual because the prescribed rules of construction cannot reasonably sustain an interpretation that collapses "fair and equitable treatment" into everything short of the most unimaginable forms of government misconduct.[234] In fact, the Notes, as qualified by the NAFTA Parties in their submissions to tribunals, seem more consistent with the NAFTA Parties' routine demand that tribunals strictly construe Chapter 11 to minimize intrusions onto sovereignty.[235] Although the rule of strict construction prevailed in

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231. *See* NAFTA, *supra* note 1, art. 102(2).

232. *See* Loewen Group, Inc. v. United States, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (Jan. 5, 2001), paras. 50-51, *available at* http://www.naftaclaims.com [hereinafter *Loewen Group*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction]; *S.D. Myers*, Partial Award, *supra* note 40, paras. 196-204; *Metalclad*, Award, *supra* note 54, para. 70; *Waste Mgmt.*, Award, *supra* note 52, § 9; *Ethyl Corp.*, Award on Jurisdiction, *supra* note 65, paras. 55-56. *See also* Brower, *Beware the Jabberwock*, *supra* note 2, at 468; Brower, *supra* note 62, at 9; Gantz, *supra* note 40, at 689; Weiler, *supra* note 3, at 428.

233. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1)-(3), 1155 U.N.T.S. 331, 340; *Metalclad*, Award, *supra* note 54, para. 70. *See also Loewen Group*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, *supra* note 232, para. 51; *S.D. Myers*, Partial Award, *supra* note 40, paras. 196-204; Brower, *Beware the Jabberwock*, *supra* note 2, at 469; Brower, *supra* note 62, at 9.

234. *See* Claimant's Post Hearing Submission (*ADF*), *supra* note 68, paras. 12, 15, 75 & n.65; Brower, *supra* note 62, at 11; Weiler, *supra* note 3, at 428-29. *See also* ADF Group, Inc. v. United States, Notice of Arbitration (July 19, 2000), para. 55, *available at* http://www.state.gov/documents/organization/3351.pdf ("The provision is in no way limited to egregious conduct alone and applies to *any* treatment that is not in itself 'fair' and 'equitable.'").

235. *See* Brower, *supra* note 62, at 11. *See also Loewen Group*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, *supra* note 232, para. 51 (refusing to accept the United States' submission that "NAFTA is to be understood in accordance with the principle that treaties are to be interpreted in deference to the sovereignty of states"); *Ethyl Corp.*, Award on Jurisdiction, *supra* note 65, para. 55 & n.20 (rejecting Canada's arguments in favor of strict construction); Methanex Corp. v. United States, Memorial on Jurisdiction and Admissibility of Respondent United States (Nov. 13, 2000), at 13-14, *available at* http://www.state.gov/documents/organization/3949.doc (conceding that the doctrine of restrictive interpretation has become obsolete in state-to-state disputes, but urging its application to investor-state disputes); Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183, 191 (2001) ("States Parties are likely to continue urging narrow construction of . . . Chapter [11], and are justified in so doing."). Ms. Bjorklund was an attorney-adviser who represented the United States in Chapter 11 disputes.

another era, it has no place in the modern law of treaty interpretation.[236] If, as seems possible, the Notes rest on the principle of strict interpretation, the members of the Free Trade Commission have deviated from ritual in a way that undermines the legitimacy of their work.

Even if the NAFTA Parties had followed the rituals of interpretation, another difficulty would remain—namely, the Free Trade Commission's own failure to adopt procedures that serve the fundamental values of accountability, transparency, and democratic participation.[237] These circumstances enabled the Free Trade Commission to issue the Notes "out of the blue," "without any prior public consultation," and without giving "any warning to investors party to ongoing Chapter Eleven arbitrations."[238] Furthermore, because the Notes appeared at a critical juncture in several arbitrations,[239] and because the NAFTA Parties have insisted on their application to pending disputes,[240] the Free Trade Commission's work appears less of a principled exercise in international governance than a clever *fait accompli* designed to avoid liability.[241] Thus, the

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236. *See Loewen Group*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, *supra* note 232, para. 51; *Ethyl Corp.*, Award on Jurisdiction, *supra* note 65, para. 55. *See also* Brower, *supra* note 62, at 11.

237. *See* PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 20 (describing the lack of public access to—and accountability of—the Free Trade Commission).

238. ADF Group, Inc. v. United States, Investor's Reply to the Counter-Memorial of the United States on Competence and Liability (Jan. 28, 2002), para. 213, *available at* http://www.state.gov/documents/organization/7920.pdf [hereinafter Investor's Reply on Competence and Liability (*ADF*)]. *See also* Letter from Robert J. Keyes, President and CEO, Canadian Council for International Business, and Nancy Hughes Anthony, President and CEO, Canadian Chamber of Commerce, to Hon. Pierre Pettigrew, Minister for International Trade 2 (Aug. 15, 2002) (on file with the author) (asserting that the Notes were prepared "without the benefit of substantive consultations with the business community").

Apparently, the NAFTA Parties did not even warn existing tribunals about the impending adoption of the Notes, then submitted them to existing tribunals without any comment or explanation, and finally declined to respond to certain questions posed by one tribunal about the Notes and their provenance. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 10, 28 n.17.

239. *See* Weiler, *supra* note 3, at 422 (observing that the U.S. government agreed to the Notes due to "a growing concern among State Department lawyers that as many as three more tribunals might soon be issuing awards that would find breaches of NAFTA art. 1105 by the United States").

240. *See supra* note 63 and accompanying text.

241. *See Methanex*, Second Opinion of Professor Sir Robert Jennings, *supra* note 68, at 4-5 (concluding that the NAFTA Parties "quite evidently organized a démarch [sic] intended to apply pressure on the tribunal to find in a certain direction by amending the treaty" and concluding that this conduct violates "the most elementary rules of . . . due process"); Investor's Reply on Competence and Liability (*ADF*), *supra* note 238, para. 215 (arguing that the Free Trade Commission adopted the Notes "for the clear purpose of limiting the liability of the [NAFTA] Parties . . . at the expense and prejudice of the investors that are the beneficiaries of the Treaty"). *See also* U.S. Post-Hearing Submission (*ADF*), *supra* note 62, at 18 (acknowledging that the Commission

NAFTA Parties have not merely used secretive, closed procedures to conduct the work of the Free Trade Commission, they also have used the Commission as a tool to gratify narrow self-interests.[242] Under these circumstances, the Free Trade Commission's work now appears to serve as a "mere hunting license[ ] for [the NAFTA Parties] to do whatever they wish."[243]

To recapitulate, annulment proceedings and binding interpretations hold the potential to mitigate several of the legitimacy concerns raised by Chapter 11 tribunals. Whereas annulment proceedings theoretically may guard against deviations from ritual, binding interpretations theoretically create a remedy for the development of incoherent doctrine and provide an opportunity for politically accountable actors—the NAFTA Parties—to have the final word on matters of treaty construction. In practice, however, annulment proceedings conducted by the municipal courts of interested parties, and the adoption of binding interpretations by interested parties, have raised serious questions of legitimacy. Whether one blames the NAFTA Parties or the treaty's structure, the fact remains that annulment proceedings and binding interpretations have become the most recent, and perhaps the most serious, development in the legitimacy crisis of NAFTA's investment chapter.

D. *Legitimacy and the Constitutional Dimension: Relationships Among Tribunals, Courts, and the Free Trade Commission*

Observers have begun to describe Chapter 11 in terms of a constitutional process[244] similar in kind, although not degree, to that of the European Union. Therefore, one must address, however briefly, legitimacy concerns raised by the constitutional relationship among Chapter 11 tribunals, municipal courts, and the Free Trade Commission. Experience shows that constitutional systems will encounter legitimacy crises unless they reach a settlement that clearly defines the respective powers and competence of constituent

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acted "largely to address the *Pope* tribunal's failure to heed the NAFTA Parties' prior statements regarding the interpretation of Article 1105(1)").

242. *See* David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 490-92 (2000) (indicating that the Commission lacks the capacity to act independently of the NAFTA Parties); Paterson, *supra* note 3, at 110 (warning that the Commission's interpretations might become "a route for political interference in tribunal decisions").

243. FRANCK, *supra* note 71, at 85. *See also* Brower, *Beware the Jabberwock*, *supra* note 2, at 485-87; Brower, *supra* note 62, at 11.

244. *See* Afilalo, *supra* note 2, at 3-4, 6-8, 54; Clarkson, *supra* note 2, at 369, 373-76, 379. *See also* David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 503 (1996) (indicating that "NAFTA has altered significantly the constitutional make-up of the Canadian state").

bodies.[245] Unfortunately, Chapter 11 allocates limited powers to three decisionmakers but fails to establish clear standards or processes to determine the limits of each one's authority. As explained below, this indeterminate separation of powers creates additional concerns, which complicate all of the problems discussed above.

In one respect, Chapter 11 tribunals have clearly limited powers—their jurisdiction extends only to investment disputes that allege violations of the disciplines set forth in Section A of NAFTA's investment chapter.[246] Article 1136, in turn, provides for "revision" or "annulment" of awards by municipal courts at the seat of arbitration, but fails to define those concepts, thereby creating ambiguity about the extent to which tribunals must share their decision-making powers with municipal courts. According to one view, this permits courts to exercise any degree of review permitted by municipal law.[247] Because that law may differ among, and even within, the three NAFTA Parties,[248] that approach provides no determinate, uniform, or permanent settlement regarding the competence of tribunals and courts.

Others believe that the NAFTA Parties' agreement to "final" and "binding" arbitration precludes judicial review of the merits, thereby limiting annulment proceedings to an examination of the record for gross procedural defects, such as decisions that exceed the tribunal's jurisdiction.[249] When required to assume the existence of such limiting principles, however, the NAFTA Parties[250] and one

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245. *See* Brewer, *supra* note 83, at 578 (quoting DAVID MCKAY, DESIGNING EUROPE: COMPARATIVE LESSONS FROM THE FEDERAL EXPERIENCE 150 (2001)). *See also* Clarkson, *supra* note 2, at 374 ("Constitutions define the parameters of formal rule-making institutions . . . [and] . . . also set limits on the powers of the institutions that they create."); Hyde, *supra* note 70, at 401 ("What a government of limited powers needs . . . is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. That is the condition of its legitimacy, and its legitimacy . . . is the condition of its life.").

246. *See* NAFTA, *supra* note 1, arts. 1116(1), 1117(1). *See also* Brower, *Beware the Jabberwock*, *supra* note 2, at 467; Weiler, *supra* note 3, at 408.

247. *See* Thomas, *supra* note 2, at 441-47 (discussing judicial review of Chapter 11 awards and apparently assuming that municipal law places the only limitations on such review).

248. *See, e.g.*, COLLIER & LOWE, *supra* note 203, at 259 (explaining that the "availability of recourse against an award in municipal courts is a matter for the local law, and there are substantial variations between different States").

249. *See* Brower, *Beware the Jabberwock*, *supra* note 2, at 479-84; Brower, *Empire Strikes Back*, *supra* note 2, at 75-78.

250. *See S.D. Myers*, Canada's Memorandum of Fact and Law, *supra* note 59, paras. 135, 137, 147, 158-59, 173-74, 196, 200-06; *S.D. Myers*, Mexico's Memorandum of Fact and Law, *supra* note 59, paras. 4, 19, 26-29, 47-52, 60-61, 101-06, 129-42; Mexico's Outline of Argument (*Metalclad*), *supra* note 23, paras. 249-50, 262; Canada's Outline of Argument (*Metalclad*), *supra* note 58, paras. 31-32, 58-62.

reviewing court[251] have responded by treating misinterpretations of Chapter 11 as a form of jurisdictional error.

In either case, the point is that Chapter 11 places indeterminate limits on the power of municipal courts to supervise the arbitral process. When combined with popular concerns about the legitimacy of Chapter 11 tribunals, this ambiguity encourages courts to second-guess decisions made by tribunals. As noted above, such textual indeterminacy might be tolerable if there were a legitimate process for identifying the point at which courts overstep their authority.[252] While the Author has suggested that, under certain circumstances, a second Chapter 11 tribunal could examine the propriety of judicial review,[253] others have disagreed.[254] Furthermore, even if Chapter 11 tribunals could provide a second layer of international review, *those* decisions would remain subject to annulment by municipal courts at the seat of arbitration, which presumably would be unlikely to honor awards condemning review by municipal courts.[255] Thus, in the absence of clear rules defining their relative authority—or procedures for creating such rules—legitimacy concerns seem likely to plague the relationship between Chapter 11 tribunals and municipal courts.

Like Chapter 11 tribunals, the Free Trade Commission has certain clearly limited powers. Thus, the Commission may adopt binding interpretations of NAFTA but not amendments, which require more formal procedures and a higher degree of political scrutiny.[256] Yet NAFTA's text leaves two major ambiguities about the Commission's authority relative to that of Chapter 11 tribunals. For example, the treaty does not specify whether the Commission's interpretations apply only prospectively, or whether they also apply to arbitrations already underway. Under these circumstances, some

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251. *See Metalclad*, Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 58, paras. 61-75; Brower, *Beware the Jabberwock*, *supra* note 2, at 479-84.

252. *See supra* note 82 and accompanying text.

253. *See* Brower, *Beware the Jabberwock*, *supra* note 2, at 482-84; Brower, *supra* note 10, at 82-84.

254. *See* Thomas, *supra* note 2, at 455-58.

255. *See* Brower, *Empire Strikes Back*, *supra* note 2, at 84.

256. *Compare* NAFTA, *supra* note 1, art. 1131(2) (authorizing the Free Trade Commission to adopt binding interpretations of NAFTA provisions), *with id.* art. 2202 (permitting the NAFTA Parties to adopt modifications of or additions to NAFTA provisions, which take effect only after approval "in accordance with the applicable legal procedures of each Party"). *See also Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 17-19; *Methanex*, Claimant's Letter Brief, *supra* note 68, at 19-20; Loewen Group, Inc. v. United States, Joint Reply of Claimants to the Counter-Memorial of the United States (June 8, 2001), para. 288, *available at* http://www.state.gov/documents/organization/6328.doc; Beauvais, *supra* note 2, at 288 n.194.

Although it may sometimes be difficult to draw practical distinctions between the two, interpretations theoretically clarify ambiguity while amendments alter substantive obligations. *See* Brower, *Empire Strikes Back*, *supra* note 2, at 56-57 n.71; Soloway & Broadhurst, *supra* note 2, at 397.

observers have come to view the Free Trade Commission as a legislative body[257] that has the power to formulate general rules of application but not to dictate the outcome of specific disputes.[258] Others see the Commission more as an adjudicative body that can wrest the power of interpretation from tribunals in particular disputes notwithstanding the troubling fact that the Commission's members have a material interest in every dispute.[259]

In addition, because the "distinction between interpretation and amendment is not always easy to draw,"[260] the Commission's work product may often be vulnerable to allegations that it crosses the line between *bona fide* interpretation and *ultra vires* amendment.[261] Unfortunately, the procedures for resolving such claims are as indeterminate as the standards to be applied. Thus, while Chapter 11 tribunals may claim the right to determine if a text qualifies as an

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257. Clarkson, *supra* note 2, at 385.

258. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, para. 50; Brower, *Beware the Jabberwock*, *supra* note 2, at 485-86; Brower, *Empire Strikes Back*, *supra* note 2, at 56 n.70; Brower, *supra* note 62, at 11; Weiler, *supra* note 3, at 427.

259. *See* U.S. Post-Hearing Submission (*ADF*), *supra* note 62, at 8-9 (indicating that the Free Trade Commission has the "plenary power [to] overrule[ ] a tribunal's authority . . . in deciding . . . investment disputes" and that tribunals play a "subsidiary role" vis-à-vis the Commission). *See also* Brower & Steven, *supra* note 40, at 200 (describing Canada's support for interpretive statements as part of an attempt by the NAFTA Parties "to take the power of decision away" from Chapter 11 tribunals).

The debate about the Commission's role is further complicated by the fact that it clearly has an adjudicative role in one narrow area: when a disputing NAFTA Party claims that a challenged measure falls within the scope of a reservation or exception established by Annexes I-IV, tribunals must submit that question to the Commission for a binding decision. *See* NAFTA, *supra* note 1, art. 1132. However, because a draft of Chapter 11 would have explicitly extended the Commission's adjudicative role to all interpretive questions in Chapter 11 disputes, because the final treaty text explicitly gives the Commission an adjudicative role only with respect to the interpretation of Annexes, and because it describes that role as "further to" the Commission's power to issue interpretative statements of general application, the better view seems to be that this last power does not encompass the authority to resolve particular investment disputes. *See id.* arts. 1131, 1132. *See also* Gary N. Horlick & Alicia L. Marti, *NAFTA Chapter 11B—A Private Right of Action to Enforce Market Access Through Investments*, 14 J. INT'L ARB. 43, 49 & n.47 (1997) (discussing the Free Trade Commission's adjudicative role under the draft and final texts of Chapter 11).

260. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 193 (2000). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. c (1987) (explaining that the distinction between interpretation and amendment "may be imperceptible in some instances").

261. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 21, 47 & n.37; *Methanex*, Second Opinion of Professor Sir Robert Jennings, *supra* note 68, at 4-5; Claimant's Post Hearing Submission (*ADF*), *supra* note 68, para. 49; Investor's Reply on Competence and Liability (*ADF*), *supra* note 238, para. 215; *Methanex*, Claimant's Letter Brief, *supra* note 68, at 17-20; Brower, *Beware the Jabberwock*, *supra* note 2, at 486 n.142; Brower, *Empire Strikes Back*, *supra* note 2, at 56-57 n.71; Weiler, *supra* note 3, at 429; Mann & von Moltke, *manuscript*, *supra* note 3, at 13.

"interpretation" or an "amendment,"[262] the NAFTA Parties contend that ad hoc tribunals have no such authority and must accept the Free Trade Commission's designation as conclusive.[263] Given the absence of clear rules defining their relative authority—or even a clear procedure for creating such rules—legitimacy concerns seem likely to plague the relationship between the Commission and Chapter 11 tribunals.

To further complicate matters, legitimacy crises between the Commission and Chapter 11 tribunals seem likely to feed back into the legitimacy crises between tribunals and municipal courts. For example, if a tribunal were to decide that a purported interpretation actually constituted an *ultra vires* amendment, the relevant NAFTA Party would almost certainly seek annulment of the award.[264] At the urging of its own government, the relevant court might determine that the tribunal exceeded its jurisdiction[265] and might, therefore, annul the award. Thereafter, the claimant and, possibly, a second Chapter 11 tribunal might characterize such annulment proceedings as an unlawful intrusion onto the merits of legal and factual determinations made in the award.[266] Such cascading allegations of *ultra vires* conduct have no logical end.

Although one might, with time, identify additional flaws in the constitutional structure of NAFTA's investment chapter, it remains sufficient to observe that the treaty fails to define the relative powers of tribunals, courts, and the Free Trade Commission, or to establish clear processes for articulating such rules. Under the circumstances, legitimacy concerns are likely to permeate the constitutional relationships among those institutions and to compound the legitimacy crisis generated by their individual shortcomings. These facts raise grave doubts about Chapter 11's long-term viability and its suitability as a model for the FTAA's investment chapter.[267]

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262. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, paras. 23-24; Brower, *supra* note 62, at 10-11; Weiler, *supra* note 3, at 429-30.

263. *See Pope & Talbot*, Award in Respect of Damages, *supra* note 51, para. 22; U.S. Post-Hearing Submission (*ADF*), *supra* note 62, at 8-12; *Methanex*, Canada's Third Article 1128 Submission, *supra* note 63, para. 10.

264. *See* Thomas, *supra* note 2, at 455 (warning that "it will be an unusual tribunal (*and one that invites judicial review*) that characterizes the Commission's interpretations as anything other than *bona fide*") (first emphasis added).

265. *See id.* at 454.

266. *See supra* note 253 and accompanying text.

267. The author recognizes that many supporters of Chapter 11 will disagree with this assessment. *See* Clarkson, *supra* note 2, at 385 ("For some, [Chapter 11] is growing healthily. . . . From this perspective, any intervention would be a mistake likely to cause more harm than it prevents."); Soloway & Broadhurst, *supra* note 2, at 404 ("What [Chapter 11] really needs is a little time . . . to sort [itself] out.").

V. LESSONS FOR THE FTAA AND OTHER MULTILATERAL INVESTMENT REGIMES

Despite the Author's growing pessimism about the prospects for Chapter 11, hope for the future remains: "If legitimacy can be studied, it can also be deliberately nourished" and fortified in the FTAA and other multilateral investment regimes.[268] The success of this endeavor depends, first, on the adaptation of Chapter 11 to meet the sources of perceived illegitimacy[269]—namely, incoherent doctrine—plus, at a minimum, *either* the lack of conformity to historical models *or* the failure to incorporate fundamental values of the governed community.[270] Furthermore, while future investment regimes must strive to achieve greater legitimacy than Chapter 11, that improvement should not come at too great an expense to the specific goals of investment regimes,[271] including the following: (1) the creation of predictable commercial frameworks for business planning, (2) substantial increases in investment opportunities, and (3) the establishment of effective and internationally neutral procedures for resolving investment disputes before impartial tribunals.[272] Because the many proponents of reform so far have not undertaken the task, the remainder of this Article measures their proposals against the criteria just mentioned.

According to some, salvation requires the adoption of rules or exceptions that possess absolute textual clarity.[273] Although perfectly clear rules might theoretically inhibit the formation of incoherent doctrine, one may doubt the ability of negotiators to capture a complex balance of stakeholder interests in simple rules as opposed to more open-textured standards.[274] Even if it were possible

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268. Franck, *Legitimacy*, *supra* note 70, at 711.

269. *See* Caron, *supra* note 70, at 561.

270. *See supra* notes 106-11 and accompanying text (identifying predictable operation as a necessary foundation, but suggesting that the legitimacy of international legal regimes may also require either conformity to historical practice or incorporation of fundamental values).

271. *See* Caron, *supra* note 70, at 566 (arguing that improvements to the legitimacy of the Security Council should not come at the expense of the institution's effective operation).

272. *See supra* notes 4-6, 21 and accompanying text.

273. *See* Mann & von Moltke, *manuscript*, *supra* note 3, at 25 ("Disciplines must be clear, not vague. They must have a finite range of interpretation, rather than be open-ended."). *See also* Ganguly, *supra* note 17, at 166 (supporting the adoption of treaty "provisions . . . making reservations or exceptions for public health concerns," including "clear carve-outs within the text of treaties").

274. *See* Price, *supra* note 117, at 111 (explaining that negotiators of Chapter 11 tried to formulate a provision "that would distinguish between legitimate regulation . . . and a taking," but "quickly gave up" on trying to resolve a complex issue that had troubled the U.S. Supreme Court for "over 150 years"). *See also* Soloway, *Challenge of Private Party*

as an exercise in definitional skills, the use of simple rules to deal with complex matters often produces absurd results at the margins, creating in turn a sense of constructive indeterminacy and a paradoxical reduction of legitimacy.[275] Furthermore, assuming that clearer rules actually produced coherent results, the foregoing discussion indicates that a legal regime's predictable operation may not by itself create widespread perceptions of legitimacy.[276] More is required—namely, conformity to historical practice or the incorporation of fundamental values.[277] Unfortunately, clearer rules and exceptions do not create pedigrees for tribunals or enhance their propensity to follow rituals. Nor do they necessarily introduce principles of accountability, transparency, or democratic participation into investor-state arbitration. Under these circumstances, while one may debate the feasibility of adopting clearer rules, one cannot seriously contend that it represents a complete solution to the legitimacy crisis in Chapter 11.

Others support the transfer of jurisdiction over investor-state disputes to municipal courts, citing the positive role that they have played in the European Union.[278] Even the proponents of this model acknowledge, however, that the tendency of national courts to support their own governments would require oversight by an international court or appellate body.[279] To be sure, the EU's experience offers a pedigree for reliance on municipal courts to cement a legal regime among developed states that have transparent and accountable judiciaries with similar traditions, unmarred by bias or inefficiency. When one moves beyond the highly integrated community of Western Europe, however, many of these assumptions no longer hold true. Thus, when applied to NAFTA, the FTAA or other multilateral regimes involving a mixture of developed and

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Participation, *supra* note 3, at 14 (acknowledging that it would be difficult to devise any formulation that "would be so determinative as not to raise interpretive issues in specific cases"); Terri L. Lilley, *Keeping NAFTA "Green" for Investors and the Environment*, 75 S. CAL. L. REV. 727, 743 (2002) (observing that environmentalists want to exempt "legitimate environmental regulations" from the disciplines of Chapter 11, but suggesting that identification of "legitimate" regulations would still be subject to a significant degree of judicial appreciation).

275. *See* FRANCK, *supra* note 71, at 67-83.

276. *See supra* notes 108-11 and accompanying text.

277. *See id.*

278. *See* Afilalo, *supra* note 2, at 9, 45, 52. *See also* Paterson, *supra* note 3, at 122 (entertaining the possibility of litigating international trade and investment disputes before domestic municipal courts). In this regard, one might also mention the Canada-United States Free Trade Agreement, which included an investment chapter, but did not provide for investor-state arbitration. *See* PRIVATE RIGHTS, PUBLIC PROBLEMS, *supra* note 17, at 7; Clarkson, *supra* note 2, at 376; Gantz, *supra* note 3, at 340-41. Given the independence, expertise, and similarities of the U.S. and Canadian benches, each state apparently had confidence that the treaty norms would be incorporated into (and applied by) the other's municipal legal system. *See id.*

279. *See* Afilalo, *supra* note 2, at 52.

developing states, the involvement of national courts would not necessarily promote accountability, transparency, or democratic participation. Nor would it necessarily serve the more specific goals of investment regimes, such as the effective resolution of disputes before impartial tribunals using internationally neutral procedures.[280] Furthermore, while appellate review by an international court offers a theoretical measure of protection, it provides little comfort to investors who may have to face two or three instances of proceedings before the biased, inefficient, or unfamiliar courts of their host states.[281] Therefore, while the transfer of jurisdiction to municipal courts might enhance the legitimacy of investment regimes made exclusively of developed, relatively homogenous states, it holds less promise with respect to investment regimes involving a mixture of developed and developing states.[282]

Additional proposals contemplate the transfer of jurisdiction for investment disputes to the more traditional process of state-to-state arbitration before ad hoc tribunals.[283] While observers predict that state-to-state arbitration would reduce the number of frivolous claims,[284] they do not always explain why. The fact is that states rarely espouse claims of any sort[285] and, when they do, often base decisions on political expediency as opposed to the merits of claims.[286] It does not take much imagination to realize that this system does not alleviate, but compounds, the legitimacy concerns surrounding Chapter 11. For example, while state-to-state arbitration before ad hoc tribunals may have a pedigree, it does not necessarily promote accountability, transparency, or democratic participation. Nor does it

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280. *See* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 5-6 (explaining that the "presumption behind the [investor-state arbitration] process is that foreign investors do not generally receive fair treatment in domestic courts in developing countries when complaining of a government action"); Brower & Steven, *supra* note 40, at 196 (observing that "the fundamental reason that the great majority of modern investment protection treaties have opted for international adjudication is that domestic courts are often in fact, and, just as important, usually are perceived to be, biased against alien investors"). *See also* Schneider, *supra* note 73, at 717 (indicating that the investor-state arbitration regime appeals to investors who are "concerned with the potential bias, inefficiency, or unfamiliarity of foreign courts").

281. *See* Brower & Steven, *supra* note 40, at 196 ("Investor confidence . . . is not furthered by requiring domestic litigation.").

282. *See* Gantz, *supra* note 242, at 487 (concluding that the "resolution of investor-host government disputes through local courts has been highly unsatisfactory").

283. *See* Beauvais, *supra* note 2, at 294; Ferguson, *supra* note 40, at 518; Ganguly, *supra* note 17, at 166; Loritz, *supra* note 47, at 548.

284. Ferguson, *supra* note 40, at 519; Loritz, *supra* note 47, at 548.

285. *See* Camponovo, *supra* note 40, at 189 (stating that "[c]ases of espousal are rare"). *See also* Gantz, *supra* note 242, at 524 (observing that the NAFTA Parties have "sparingly" pursued state-to-state arbitration).

286. *See* Brower & Steven, *supra* note 40, at 197; Byrne, *supra* note 49, at 418-29, 429; Camponovo, *supra* note 40, at 189.

promote the development of coherent doctrine, although the smaller volume of claims may retard the appearance of incoherence. To the contrary, by committing the resolution of investment disputes to a discretionary, political process, state-to-state arbitration introduces a new layer of incoherence with respect to the pursuit of meritorious claims.[287] From investors' perspective, state-to-state arbitration operates less predictably and legitimately than investor-state arbitration.[288] It also undermines the more specific goal of creating procedures for the effective resolution of investment disputes. In short, state-to-state arbitration offers a poor solution to the legitimacy crisis of Chapter 11.

Substantially more promising are proposals to create a standing court or arbitral tribunal based on the model of the European Court of Justice (ECJ) or the Iran-United States Claims Tribunal.[289] In theory, a permanent judicial body of limited membership could promote the development of consistent doctrine and could adopt working procedures that enhance accountability and transparency. Yet such a body would raise at least one concern about legitimacy and one concern about the specific goals of investment regimes. With regard to the former, it seems that most observers have overlooked the problem of "control."[290] While international adjudication traditionally has followed a single-instance procedure, the lack of secondary control enables tribunals of limited authority to deviate from ritual and to exceed the boundaries of their competence.[291] Although the NAFTA Parties enlisted municipal courts to exercise judicial control over Chapter 11 tribunals,[292] this experiment so far has proven to be an impediment to the legitimate operation of NAFTA's investment chapter.[293] Therefore, to maximize legitimacy,

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287. *See* Byrne, *supra* note 49, at 419 (explaining that if a "private party . . . must depend on government intervention for the enforcement of international treaties," it "cannot count on a consistent application of laws or prosecution of legal rights").

288. *See id.* at 416, 419 (concluding that the placement of control over claims into "the hands of . . . discretionary government agents . . . decreases predictability" for investors).

289. *See* W. Michael Reisman, *Control Mechanisms in International Dispute Resolution*, 2 U.S.-MEX. L.J. 129, 136-37 (1994); Loritz, *supra* note 47, at 548. *See also* Gantz, *supra* note 242, at 527-28 (rejecting the concept of an international trade court as politically unpalatable, but supporting the creation of a single-instance arbitral tribunal having a permanent membership of nine individuals who would sit in three-person chambers).

290. *See* Reisman, *supra* note 289, at 129 (observing that controls still receive "insufficient attention" in the design of procedures for transnational dispute resolution). *See also* Dodge, *supra* note 183, at 191 (identifying the need for a "system of control" for Chapter 11 arbitrations, but not developing a concrete proposal).

291. *See* Reisman, *supra* note 289, at 130.

292. *See supra* notes 36-37, 203 and accompanying text.

293. *See supra* notes 209-23 and accompanying text.

a second instance of judicial control or review at the international level seems in order.

With respect to the more specific goal of creating effective procedures for resolving disputes, the Author finds it unlikely that a single tribunal could adequately and seasonably establish the facts and shepherd a coherent body of doctrine in the full range of disputes. After all, these disputes have reached almost 20 claims involving complex questions of judicial and bureaucratic procedure, environmental regulations, conservation programs, and measures to protect public health and safety.[294] Such pressures would inevitably manifest themselves in the tribunal's jurisprudence, perhaps in the form of incorrect decisions or undue delay. Neither prospect seems particularly inviting to investors and their host states.

Given the Author's concerns about a single instance of adjudication before a standing tribunal, the most encouraging alternative may be to retain a first instance of investor-state arbitration before ad hoc tribunals, but to add a second instance comprising plenary review of legal questions by a standing appellate tribunal.[295] Under these circumstances, the ad hoc tribunals could resolve disputes efficiently by concentrating on development of factual records and application of the law. With a small and stable membership, the appellate tribunal could focus on reviewing adherence to ritual at the first instance and supervising the development of a coherent body of law among the various tribunals. Needless to say, both instances should enhance transparency by incorporating a system of public disclosure and access.[296]

With a standing appellate body of recognized expertise and probably a developed sense of accountability available to correct legal errors, the states parties would presumably feel less inclined to use political intervention by the Free Trade Commission or its equivalent under the FTAA to shape the outcome of particular disputes.[297] Furthermore, as NAFTA's three-party investment regime expands to

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294. *Cf.* Schneider, *supra* note 73, at 765-66 (expressing concern that global membership could overwhelm a single-instance supranational court and predicting, for example, that the ECJ would require "further screening mechanisms . . . or additional lower courts").

295. *See* Abbott, *supra* note 64, at 308; Dodge, *supra* note 67, at 918.

296. *See* Cremades & Cairns, *supra* note 3, at 197 (suggesting that the "damaging allegations of excessive secrecy could be met in part by the recognition within the dispute resolution clauses in multilateral and bilateral investment treaties of a public right of information"); Gantz, *supra* note 242, at 525 (concluding that "much of the aura of secrecy could be resolved quickly if *all* the governments would use their existing Secretariat website to set forth a brief summary of the matters set for arbitration, publish the parties' submissions promptly after they are submitted, and open the hearings to the public").

297. To eliminate completely the possibility of such intervention and to reinforce the Commission's role as a legislative body, its mandate should be revised to forbid the adoption of retroactive interpretations designed to resolve ongoing disputes.

the entire Western hemisphere, it will become increasingly difficult for its political organs to agree on binding interpretive statements as a means of promoting coherent doctrine. Thus, for multilateral investment regimes with a broad membership, an appellate tribunal may be essential for correcting legal errors in specific cases and for the maintenance of systemic coherence.

Although an appellate tribunal has many advantages, its supporters have not, to the Author's knowledge, addressed at least two problems related to the specific goals of investment regimes and one problem related to legitimacy. With regard to the former, effective dispute resolution requires finality and enforceability. Although the prospect of a second instance would necessarily affect investors' expectations of finality, the countervailing benefits to legitimacy would be substantial and the consequences would be less deleterious than current fears of heightened review by municipal courts. Furthermore, treaty texts could discourage abuse of the appeals process by requiring appellants to pay respondents' costs and attorney fees following unsuccessful appeals. With respect to enforceability, treaty texts could no longer refer enforcement matters to the New York and Inter-American Conventions and their concomitant process of domestic judicial review,[298] but would have to provide for automatic enforcement of appellate tribunal decisions—and decisions not timely appealed—in the manner contemplated by the ICSID Convention.[299]

With respect to legitimacy, the fact remains that an appellate tribunal has a judicial, as opposed to a political, character and, therefore, necessarily provides limited opportunities for democratic participation. Democratic participation may, however, be incorporated into future investment regimes through a modified version of the Free Trade Commission. The principle of democratic participation requires modification of the Commission's working procedures. Instead of adopting interpretations without warning, public consultation, or even a reasoned decision, as it did in July 2001,[300] the Commission's members should establish multi-stakeholder national advisory groups to provide more public involvement in, and supervision of, the development of proposals for action by the Commission.[301] Only by doing so may the states parties ensure that the Commission fulfills its promise of supplying an

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298. *See* New York Convention, *supra* note 28, art. V; Inter-American Convention, *supra* note 29, art. 5.

299. *See* ICSID Convention, *supra* note 24, arts. 53, 54.

300. *See supra* note 238 and accompanying text.

301. In this respect, Canada deserves recognition as the only NAFTA Party to have established such an advisory group. *See* MANN & VON MOLTKE, NAFTA'S CHAPTER 11, *supra* note 3, at 9, 10, 59; Paterson, *supra* note 3, at 106; Soloway, *Challenge of Private Party Participation*, *supra* note 3, at 13.

accountable, transparent, and democratic tool for guiding the evolution of a coherent and desirable investment regime.[302]

In short, while superior proposals may emerge in due course, it appears that the continuation of ad hoc arbitration, followed by review by a standing appellate tribunal, and supervised by an accountable, transparent, and publicly accessible Free Trade Commission, would best serve the combined interests of promoting legitimacy and foreign investment.

VI. CONCLUSION

Chapter 11 finds itself in the midst of a legitimacy crisis, in which claimants, arbitral tribunals, and the NAFTA Parties accuse each other of illegitimate conduct during the course of resolving investment disputes. Such widespread perceptions of illegitimacy pose a serious threat to the long-term survival of NAFTA's investment chapter and its suitability as a model for other multilateral investment treaties. Upon examination, the sources of illegitimacy seem obvious. Treaty provisions lack a substantial measure of textual clarity. Ad hoc tribunals based on the model of commercial arbitration have generated incoherent doctrine on a key provision. They also lack a pedigree accepted as valid by the governed community and may seem prone to depart from ritual due to inexperience. Furthermore, by their very nature, ad hoc tribunals tend to be relatively less accountable, transparent, and accessible to democratic processes than permanent tribunals.

Turning to the involvement of municipal courts in annulment proceedings and the Free Trade Commission in adopting interpretive statements, one finds that the NAFTA Parties have not resolved the problem of doctrinal incoherence, but instead have raised new concerns by transforming important decision-making rituals into opportunities to promote narrow self-interest. Furthermore, the Free Trade Commission has adopted working procedures that undermine the principles of accountability, transparency, and democratic participation. Compounding all of the foregoing problems, Chapter 11 creates a sort of constitutional indeterminacy by failing to fix clear rules, or procedures for establishing rules, on the allocation of decision-making power among arbitral tribunals, municipal courts, and the Free Trade Commission.

While possibly life-threatening, Chapter 11's ailments remain capable of treatment. Among the various prescriptions, continuation of ad hoc arbitration, followed by review by a standing appellate tribunal, and supervised by an accountable, transparent, and publicly

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302. *See* Caron, *supra* note 70, at 588 (expressing hope that the "opportunity to participate[ ] can resolve . . . concerns about illegitimacy").

accessible Free Trade Commission, seems best suited to promote a legitimate investment regime, which will in turn provide the "lifeblood of globalization."[303]

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303. Cremades & Cairns, *supra* note 3, at 174.